

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

United States Court of Appeals
For the
District of Columbia Circuit

FILED

OCT 11 1961

Joseph W. Stewart

BRIEF FOR APPELLANTS AND JOINT APPENDIX **CLERK**

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16,600

691

WESTERN URN MANUFACTURING COMPANY, AND
FARMERS BROS. CO.,

Appellants,

v.

AMERICAN PIPE & STEEL CORPORATION,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JOHN H. MacVEY

1025 Connecticut Avenue, N.W.
Washington 6, D. C.

Attorney for Appellants

(i)

STATEMENT OF QUESTIONS PRESENTED

The questions presented are whether the mandate of this Court in its previous decision on the first appeal of this case (No. 15,573, decided October 6, 1960) permits amendment of the complaint in this action directed to show that the court below has jurisdiction of this action in accordance with the decision of this Court, and whether appellants' motion for leave to file an amended complaint and to summon additional parties should be granted.

INDEX

	<u>Page</u>
JURISDICTIONAL STATEMENT	1
STATEMENT OF THE CASE	2
STATUTES INVOLVED	5
STATEMENT OF POINTS	5
SUMMARY OF ARGUMENT	6
ARGUMENT	11
OPENING STATEMENT	11
I. The Mandate of this Court in this Action Does Not Specifically Prohibit Amendments of the Pleadings In this Action and Therefore the Lower Court Could Allow Any Amendment of the Original Complaint which is Not Inconsistent with the Directions of this Court Contained in Its Mandate. Accordingly, the Interpretation by the Lower Court That the Mandate of this Court Prohibits Amendments Is Wrong	13
II. The "Finding" by the Court Below Was Premature And Highly Prejudicial to Appellants Because It Deprived them of Their Statutory Right Under 16 D.C. Code 317 to Trial by Jury of the "Jurisdictional Fact" of "Possession" to be Determined in Accordance with Applicable Principles of Law	18
III. The Proposed Amended Complaint is a Proper Amendment of the Original Complaint in Accordance With the Federal Rules of Civil Procedure Which Relates Back to the Date of Filing of the Original Complaint so that the Refusal of the Court Below to Permit the Proposed Amendment Was Highly Prejudicial to Appellants and in Violation of the Spirit and Meaning of the Federal Rules of Civil Procedure Because Such Refusal Prevented Appellants from Presenting Their Case to Show That the Court Below Has Jurisdiction of this Action in Accordance with the Decision of this Court In this Action	20
CONCLUSION	25

CASES CITED

	<u>Page</u>
Britton v. Dowell, 243 F. 2d 435 (CCA 10, 1957)	15, 16, 17
Brown v. Gesellschaft fur Drahtlose Telegraphie, M.B.H., 70 App. D.C. 95, 104 F. 2d 227 (1939)	14
* Davis v. Davis, 68 App. D.C. 240, 96 F. 2d 512 (1938), reversed on other grounds, 305 U.S. 32	14
Dickinson v. Brooks, 71 App. D.C. 106, 108 F. 2d 4 (1939)	18
Emich Motors Corp. v. General Motors Corp., 229 F. 2d 714 (CCA 7, 1956)	24
Goodacre v. Shulmier, 64 App. D.C. 10, 73 F. 2d 519 (1934)	22
* Guth v. Texas Company, 155 F. 2d 563 (CCA 7, 1946), cert. denied, 332 U.S. 844, 849	22, 24
Hardee v. George H. Price Co., 67 App. D.C. 25, 89 F. 2d 497 (1937)	12
Keiser v. Walsh, 73 App. D.C. 167, 118 F. 2d 13 (1940)	22
* Markert v. Swift & Co., 173 F. 2d 517 (CCA 2, 1949)	24
* McHenry v. Ford Motor Co., 269 F. 2d 18 (CCA 6, 1959)	24
Pinkston v. Briley, ¹²⁹ ~~116~~ A. 2d 185 (Municipal Court of Appeals D.C., 1957)	18
Pyramid National Van Line v. Goetze, 66 A. 2d 603 (Mun. Ct. App. D.C., 1949)	14
Robbins v. Jordan, 86 U.S. App. D.C. 305, 181 F. 2d 793 (1950)	24
* International Ladies Garment Workers Union v. Donnelly Garment Co., 121 F. 2d 561 (CCA 8, 1941)	23, 25
* Salvoni v. Pilson, 86 U.S. App. D.C. 227, 181 F. 2d 615 (1950), cert. denied, 338 U.S. 981	25
Tahir Erk v. Glenn L. Martin Co., ¹¹⁶ ~~116~~ F. 2d 865 (CCA 4, 1941)	22
* Troshinsky v. Feldman, 81 A. 2d 90 (Mun. Ct. App. D.C., 1951)	18
Young v. Nicholson, 70 App. D.C. 351, 107 F. 2d 177 (1939)	18

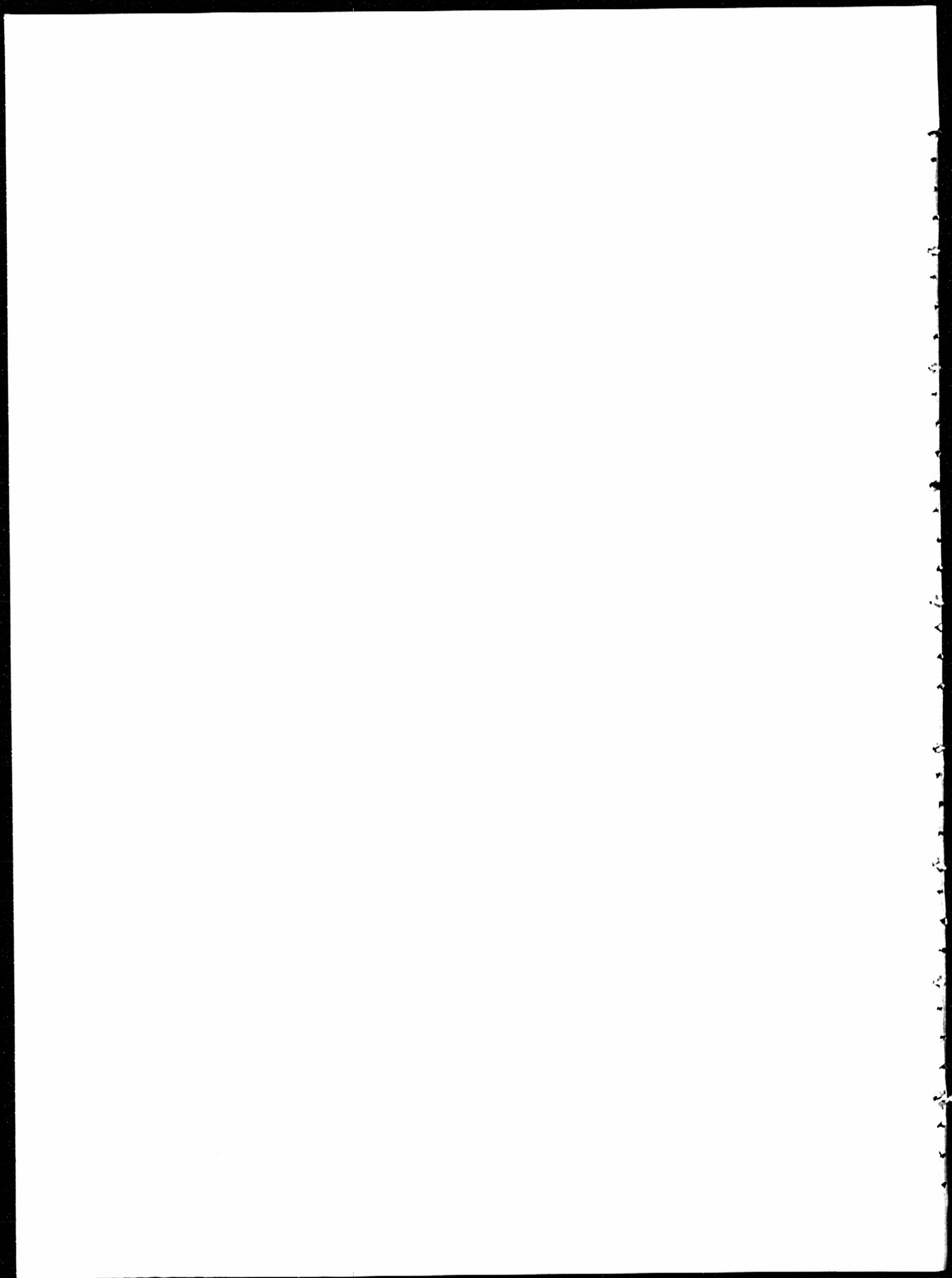
STATUTES CITED

16 D.C. Code 303	5
16 D.C. Code 317	5, 19
16 D.C. Code 326	5, 21

MISCELLANEOUS CITATIONS

	<u>Page</u>
* 3 American Jurisprudence, Appeal and Error, sec. 1219, 1233, 1241; 1961 Cum. Supp., note 19	14, 17
Bouvier's Law Dictionary, vol 3, p. 2636 (8th ed.)	18
5 Cyclopedia of Federal Procedure (2d ed.), sec. 1908	22
1 Flaherty, District of Columbia Practices, p. 407	21
* 3 Moore's Federal Practice, par. 15.07, 15.11	14, 22, 23

* Cases and authorities chiefly relied on are marked by asterisks.



UNITED STATES COURT OF APPEALS
For The District Of Columbia Circuit

No. 16,600

WESTERN URN MANUFACTURING COMPANY, AND
FARMERS BROS. CO.,

Appellants,

v.

AMERICAN PIPE & STEEL CORPORATION,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANTS

JURISDICTIONAL STATEMENT

The jurisdiction of this Court is invoked under Section 101 of Title 17 of the District of Columbia Code (1951 ed.) to review the action of the U. S. District Court for the District of Columbia in this proceeding.

This action was previously before this Court on appeal in No. 15,573 in which an order dismissing the complaint was reversed and the case was remanded to the court below for further proceedings. The court below in such further proceedings entered a final order reentering the previous

order dismissing the complaint for want of jurisdiction and quashing the writ of attachment before judgment.

STATEMENT OF THE CASE

As stated, this action was previously before this Court in No. 15,573 on appeal by the plaintiffs-appellants (who are also the appellants on this appeal) from an order dismissing the complaint for want of jurisdiction and quashing a writ of attachment before judgment. By its opinion and mandate in its decision decided on October 6, 1960, this Court reversed the order of the lower court and remanded the action to the lower court for further proceedings in accordance with the following direction of this Court stated in its opinion:

"Since there is no showing as to the state of his (Greene's) indebtedness to the appellee at the time the writ was served, we will vacate the order of dismissal and remand the case to the District Court to the end that it be ascertained whether or not Greene had funds belonging to the appellee in his possession or was otherwise indebted to it at the time of the service of the writ of attachment. If the Court shall find that Greene at the time of service of the writ was not indebted to the appellee or otherwise possessed its assets, the order of dismissal will be re-entered.

"If on the other hand Greene shall be found to have been possessed of assets, funds or credits of the appellee at the time the writ was served, the court shall reinstate the complaint, subject to such further proceedings as the parties may feel advised to pursue." (emphasis supplied)

The facts on which the original complaint and attachments before judgment are based are clearly stated in this Court's opinion and therefore are not repeated here. Briefly, however, appellants assert a claim based on a written agreement with appellee against the proceeds of a U. S. Treasury check payable to the appellee and physically delivered to Mr. Greene, attorney for the appellee.

The judgment and decision of this Court clearly was that the lower court has jurisdiction of this action in the circumstances of this case if

it were shown that Greene, counsel for defendant and one of the garnishees in this action, was "possessed" of any funds, assets, or credits of the defendant-appellee when the writ of attachment before judgment was served upon Mr. Greene. This Court said that, although the record then before this Court strongly indicated that Mr. Greene did have funds of the defendant-appellee in his possession on October 16, 1959, when the original complaint was filed and the writ served, the record was deficient because it failed to show that Mr. Greene had such "possession" at the time of service of the writ.

The opinion of this Court therefore establishes the "law of the case" that the lower court does have jurisdiction of this action if the plaintiffs-appellants are able to show to the lower court the "jurisdictional fact" that Mr. Greene did have "possession" of funds of the defendant-appellee at the time of service of the writ of attachment before judgment.

It is emphasized that this Court in its opinion and mandate did not in any way specify the procedure to be followed in the lower court for determination of the "jurisdictional fact" of "possession" by Mr. Greene of funds of the defendant-appellee. It is also emphasized the determination of the "jurisdictional fact" of "possession" is not a simple factual question, but is a question whose answer depends upon the correct facts as interpreted in accordance with applicable legal principles.

Accordingly, plaintiffs-appellants decided to proceed to obtain the facts concerning the "jurisdictional fact" of "possession" by Mr. Greene under the oral examination and traverse procedure applicable to answers to interrogatories accompanying writs of attachment specified by Title 16 of the District Code, particularly in sections 303 and 317 (1951 ed.). They first obtained an order of the lower court reinstating the case (JA 20). Then they obtained an order authorizing the oral examination of one of the two garnishees, the National Savings and Trust Company (JA 20).

However, in the process of preparing for the oral examination of the garnishee, the National Savings and Trust Company, counsel for the plaintiffs-appellants discovered for the first time facts which required plaintiffs-appellants to change the theory of their action in order to establish the "jurisdictional fact" of "possession" by Mr. Greene (Record; affidavit by John H. MacVey dated May 4, 1961). Then, before the oral examination of the garnishee, National Savings and Trust Company, counsel for plaintiffs-appellants prepared and filed on April 17, 1961, a motion for leave to file an amended complaint and to summon additional parties. (JA 21)

The oral examination of the garnishee, National Savings and Trust Company, was thereafter held on April 17, 1961. (Record; Trust Test.) At the close of that oral examination, counsel for the plaintiffs-appellants informed the lower court of the motion for leave to amend (Tr. 26). However, the lower court insisted on making a finding of "possession" solely on the basis of the oral examination of one garnishee (JA 35). over the objection by counsel for the plaintiffs-appellants that such a finding was premature (Tr. 27).

After making its "finding," the lower court then considered the motion by plaintiffs-appellants for leave to file an amended complaint and to summon additional parties, and refused to allow any amendment of the original complaint on the ground that the mandate of this Court did not permit the lower court to allow any amendment of the original complaint (JA 36). The lower court thereafter entered its order re-entering the original order dismissing the complaint for want of jurisdiction and quashing the writ of attachment before judgment (JA 37).

The action by the lower court in making its premature finding, in denying plaintiffs-appellants' motion for leave to amend, and in reentering the order of dismissal cut off the plaintiffs-appellants from taking any further action and prevented the plaintiffs-appellants from presenting their case to show the "jurisdictional fact" of "possession" by Mr.

Greene of funds of the defendant-appellee at the time of the service of the writ of attachment before judgment and thereby establish the jurisdiction of the lower court to hear this case. Accordingly, plaintiffs-appellants took this appeal (JA 38).

STATUTES INVOLVED

16 D.C. Code 303 (1951 ed.)

"In all cases of attachment . . . In addition to the answers to written interrogatories required of him, the garnishee may, on motion, be required to appear in court and be examined orally under oath touching any property or credits of the defendant in his hands."

16 D.C. Code 317 (1951 ed.)

"If any garnishee shall answer to interrogatories that he has no property or credits of the defendant, or less than the amount of the plaintiff's claim, the plaintiff may traverse such answer as to the existence or amount of such property or credits, and the issue thereby made may be tried as provided in section 16-316 . . ."

16 D.C. Code 326 (1951 ed.)

"If the ground upon which an attachment is applied for be that the defendant has assigned, conveyed, or disposed of his property with intent to hinder, delay, or defraud his creditors, the attachment may be levied upon the property alleged to be so assigned or conveyed in the hands of the alleged fraudulent assignee or transferee, as a garnishee."

STATEMENT OF POINTS

The Court below erred as follows:

1. In denying leave to file the proposed amended complaint and to bring in additional parties on the ground that the mandate of the appellate court in this case prohibits any amendment to the original complaint.

2. In first making on its own initiative without any motion or other request by plaintiffs-appellants a finding of fact concerning "possession"

of the U. S. Treasury check involved in this action without first considering plaintiff's pending motion for leave to file an amended complaint and without first considering the facts alleged in said amended complaint, thus denying appellants' right to trial by jury under 16 D.C. Code 317.

3. In denying the plaintiffs-appellants leave to file an amended complaint and to bring in additional parties.

4. In ordering that the previous order by Judge Richmond B. Keech, dated November 13, 1959, dismissing the original complaint for want of jurisdiction be reentered.

SUMMARY OF ARGUMENT

As the opinion of this Court on the first appeal decided on October 6, 1960, shows, this action is based upon a written agreement between the appellants and the appellee by which appellees agreed to pay to appellants a certain portion of the funds received by appellee in compromise of certain claims by the appellee against the United States in the U. S. Court of Claims. The claims of the appellee against the United States were settled by compromise, but the appellee did not make any arrangements to pay appellants' claim as they demanded. Accordingly, when appellants learned that a U. S. Treasury check in payment of the compromise settlement with the United States was to be delivered to Mr. Greene, attorney for the appellee, the appellants filed the original complaint asserting their claim against the proceeds of that Treasury check and served a writ of attachment before judgment on Mr. Greene on the same day that the original complaint was filed, namely, October 16, 1959.

The court below, on the defendant-appellee's motion to dismiss, did dismiss the complaint for want of jurisdiction on the ground that both parties are foreign corporations not doing business in the District of Columbia and accordingly also quashed the writ of attachment before judgment served on Mr. Greene.

The decision of this Court on the first appeal definitely establishes the "law of the case" that the lower court does have jurisdiction of this action if the plaintiffs-appellants can prove the "jurisdictional fact" that Mr. Greene had "possession" of funds of the defendant-appellee when he was served with the writ of attachment before judgment on October 16, 1959. This Court said in its opinion that "every indication" on the record then before this Court was that funds of the defendant-appellee came into the hands of Mr. Greene "at some time" on October 16, 1959. Since, however, the jurisdiction of the lower court has to be based upon attachment of the funds of the defendant-appellee in the hands of Mr. Greene at the time of service of the writ upon him, the record then before this Court was deficient because it failed to show whether Mr. Greene had "possession" of funds of the defendant-appellee when he was served with the writ of attachment before judgment. Therefore this Court reversed the order of dismissal by the lower court and remanded the action to the lower court to determine that "jurisdictional fact" of "possession" of funds of defendant-appellee by Mr. Greene at the time of the service of the writ. This Court also directed the lower court either to reenter the order of dismissal or to reinstate the complaint, in accordance with the "finding" of the lower court ^{determining} ~~should determine~~ the "jurisdictional fact" that Mr. Greene did not or did have "possession" of such funds.

This Court therefore remanded this action because of a "gap in the record" with respect to "possession" of the funds of the defendant-appellee.

It is emphasized that the question of "possession" is not a simple factual question, but is a mixed question of law and fact. It is most important to note that this Court did not instruct the lower court in any way concerning the procedure by which the lower court was to determine the "jurisdictional fact" of "possession." It is obvious from a reading of this Court's opinion containing its mandate that this Court did not specifically prohibit any amendment of the pleadings in this action.

(Parenthetically, it should also be noted that the only pleadings in this action at this time are the original complaint, since the defendant-appellee has not filed any answer or other responsive pleading within the meaning of Rule 7(a) of the Federal Rules of Civil Procedure.) This Court therefore obviously left the problem of the procedure for determination of the "jurisdictional fact" of "possession" to the initiative of the plaintiffs-appellants and the lower court.

It is established law that, when an action is reinstated in a lower court, as was done in this case by Judge Keech's order (JA 20). then the lower court reacquires jurisdiction to proceed in accordance with normal procedure which is not inconsistent with the terms of the mandate of the appellate court. Appellants therefore contend that, so far as the interpretation of the mandate of this Court is concerned, they have the legal right to make any amendments of the original complaint which are relevant to the question of the "jurisdictional fact" of "possession" and which otherwise comply with the requirements of the Federal Rules of Civil Procedure controlling in the court below. Therefore, appellants respectfully submit that the decision by Judge McGuire in his memorandum opinion of June 1, 1961 (JA 36). denying appellants' motion for leave to file an amended complaint because this Court's mandate prohibits any amendment of the original complaint is wrong, so that the order of dismissal should be vacated and this action remanded for further proceedings.

The confusion leading to this appeal results in part from the fact that counsel for the appellants did not know all of the correct and pertinent facts on which appellants' claim of jurisdiction is based until after this action was remanded to the lower court. (Record; affidavit of John H. MacVey dated May 4, 1961.) These facts could not have been discovered earlier because of the conduct by Mr. Greene of which appellants seek to complain and because of the order dismissing the complaint in the lower court which cut off any further discovery proceedings by appellants in the lower court.

Since the mandate of this Court left the initiative for instituting further proceedings in the lower court after the remand to the appellants, counsel for the appellants, thinking that the facts on which the original complaint was based were correct, decided to proceed by the discovery procedure under Title 16 concerning garnishees to show the "jurisdictional fact" of "possession." Under 16 D.C. Code 303, appellants had the right first to examine both garnishees under oath orally in court. Then, if the answers were not considered satisfactory, the appellants had the right to file a traverse under 16 D.C. Code 317 and have a jury trial concerning the question of "possession" of funds of the defendant-appellee.

As a preliminary step, counsel for appellants therefore obtained court authority for the oral examination of one of the garnishees, the National Savings & Trust Company (JA 20). In the course of preparing for that oral examination, counsel for appellants discovered for the first time additional facts concerning the original transaction attempted to be alleged in the original complaint which required a change of the legal theory on which appellants' claim of jurisdiction of the lower court is based. (Record; MacVey affidavit, supra.) Counsel for the appellants therefore immediately prepared an amended complaint based on the new facts and theory and filed the motion for leave to file an amended complaint and to summon additional parties before the oral examination of the garnishee, the National Savings and Trust Company (JA 21).

At that point, counsel for appellants could have requested a continuance of the oral examination of the National Savings & Trust Company until after a ruling had been made on the motion for leave to amend. However, counsel for appellants decided to continue with the oral examination as scheduled for the purpose of showing that Mr. Greene did in fact have physical possession of a portion of the proceeds of the U. S. Treasury check when he was served with the writ of attachment before judgment. The evidence taken at that oral examination shows conclusively that Mr. Greene did receive physical possession of the U. S. Treasury check on October 16, 1959; that \$50,000 of the proceeds of that check

were deposited to the account of Mr. Greene and his law partners; and that the deposit of the \$50,000 was a conveyance by the defendant-appellee to Mr. Greene and his law partners (Tr. 5, 6, 15, 17, 23, 24). Accordingly, appellants contend and respectfully submit that Mr. Greene did have physical possession of a portion of the proceeds of the U. S. Treasury check against which the appellants assert a claim at the time of the service of the writ of attachment before judgment.

At that point, the question then became whether the proceeds of the U. S. Treasury check physically possessed by Mr. Greene and his partners were legally "possessed" by them or were funds owned by the defendant-appellee as a matter of law which were in the physical possession of Mr. Greene and his partners when the writ of attachment before judgment was served. The answer to that question depends upon the allegations of the complaint. Appellants therefore sought by their motion for leave to amend to allege facts showing that the funds in the physical possession of Mr. Greene and his partners were owned as a matter of law by the defendant-appellee when the writ of attachment before judgment was served, in order to show that the lower court does have jurisdiction of this action under the decision of this Court.

Appellants contend that the "finding" by Judge McGuire based only on the oral examination of the National Savings and Trust Company (JA 35) was premature denial of their right to trial by jury and prejudicial to appellants which led to the erroneous conclusion that the lower court had no jurisdiction to permit any amendment of the original complaint after the premature "finding" had been made. (JA 36).

Appellants further contend that the proposed amended complaint is consistent with the mandate of this Court because it is directed specifically to the "jurisdictional fact" of "possession" of funds of the defendant-appellee at the time of service of the writ of attachment before judgment; that it properly is based upon a new theory of the case which does not change the original cause of action, so that the proposed amended

complaint relates back to the date of filing of the original complaint; that the proposed amended complaint properly seeks to join additional parties who were parties to the original transaction attempted to be alleged in the original complaint; and that accordingly if the allegations of the proposed amended complaint are sustained they will show that the lower court does have jurisdiction of this action under the "law of the case" stated by this Court in its opinion of October 6, 1960.

Appellants further contend that, although the defendant-appellee is an indispensable party to this action, it is subject to the jurisdiction of the lower court in this action under the "law of the case" rule by operation of the writ of attachment before judgment served on Mr. Greene if the allegations of the proposed amended complaint are sustained.

Appellants therefore contend and respectfully submit that the judgment and action of the court below have improperly prevented the appellants from presenting their case to the court showing that the lower court does have jurisdiction of this action in accordance with the "law of the case" rule. Such a result is highly prejudicial to the appellants and is in violation of the spirit and meaning of the Federal Rules of Civil Procedure. Accordingly, appellants submit that the order of the lower court should be vacated and this action should be remanded with directions to allow appellants to file an amended complaint and to amend their affidavit in support of the writ of attachment before judgment.

ARGUMENT

OPENING STATEMENT

It may be helpful to the Court to explain at the outset the reason for the change of theory of this action by counsel for the appellants.

When counsel for appellants was instructed to institute this action, he knew that Mr. Greene, as the partner in the law firm handling the U. S. Court of Claims cases for the defendant-appellee, was to receive

personally the U. S. Treasury check in settlement of such claims and this knowledge was verified as fact by evidence at the oral examination on April 17, 1961, and the admission of Mr. Greene (Tr. 5 & Ex. 1). Counsel for appellants had been prevented from learning the details of negotiation of the U. S. Treasury check (Record, MacVey affidavit, supra), and therefore was compelled to assume certain facts in preparing the original complaint. Counsel for appellants accordingly assumed that Mr. Greene, in accordance with customary practice of District of Columbia lawyers, had a power of attorney from the defendant-appellee; that he endorsed the check and deposited the check for collection by his bank; and that he would, when the check had been collected, deduct the amount of his legal fee from the amount of the U. S. Treasury check and then send a certified check for the balance to the defendant-appellee. Under such assumed facts on which the original complaint was drafted, Mr. Greene would have been acting as agent for the defendant-appellee and the U. S. Treasury check which had been deposited for collection would have been funds of the defendant-appellee in the "possession" of Mr. Greene at the time of the service of the writ of attachment before judgment (Hardee v. George H. Price Co., 67 App. D.C. 25, 89 F.2d 497 (1937)), thus giving the lower court jurisdiction of this action.

As counsel for appellants has stated in his affidavit of May 4, 1961, contained in the record of this appeal, he discovered on April 5, 1961, for the first time the correct details of the negotiation of the U. S. Treasury check, as set forth in the testimony of Mr. Ford at the oral examination on April 17, 1961 (Tr. 6-24), namely, that the president of the defendant-appellee came to Washington, D.C. where he endorsed the check which was cashed by the National Savings and Trust Company on October 16, 1959, at which time he conveyed \$50,000 of the proceeds of the said check to Mr. Greene and his partners, as testified by Mr. Ford (Tr. 24). In order therefore to show that the lower court has jurisdiction of this action under the "law of the case" rule, it became necessary for counsel for appellants to amend the original complaint to allege that the conveyance by

the defendant-appellee was an illegal conveyance intended to hinder and delay creditors, the appellants here, so that, as a matter of law, the proceeds of the U. S. Treasury check conveyed to Mr. Greene and his partners were funds of the defendant-appellee in the "possession" of Mr. Greene and his partners at the time of the service of the writ of attachment before judgment, thus establishing the jurisdiction of the lower court in this action in accordance with the decision of this Court on the first appeal. Counsel for appellants therefore filed the motion for leave to file an amended complaint and to summon additional parties, as previously stated.

Counsel for appellants respectfully submits that, if the proposed amended complaint had been filed as the original complaint in this action, the lower court would clearly have jurisdiction of this action.

I

THE MANDATE OF THIS COURT IN THIS ACTION DOES NOT SPECIFICALLY PROHIBIT AMENDMENTS OF THE PLEADINGS IN THIS ACTION AND THEREFORE THE LOWER COURT COULD ALLOW ANY AMENDMENT OF THE ORIGINAL COMPLAINT WHICH IS NOT INCONSISTENT WITH THE DIRECTIONS OF THIS COURT CONTAINED IN ITS MANDATE. ACCORDINGLY, THE INTERPRETATION BY THE LOWER COURT THAT THE MANDATE OF THIS COURT PROHIBITS AMENDMENTS IS WRONG.

As stated previously, this Court decided on the first appeal that the lower court does have jurisdiction of this action if Mr. Greene had "possession" of funds of the defendant-appellee when he was served with the writ of attachment before judgment. Since the record on appeal at that time was not sufficient to enable this Court to determine the question of "possession" at the time of service of the writ, this Court remanded the action with directions for the lower court to make such a determination. Again, it is emphasized that this Court did not instruct the lower court in any way as to what procedure the lower court should follow in making the required determination concerning "possession."

The courts of the District of Columbia, of course, follow the "law of the case" rule. Davis v. Davis, 68 App. D.C. 240, 96 F.2d 512 (1938); reversed on other grounds, 305 U.S. 32; Brown v. Gesellschaft fur Drahtlose Telegraphie, M.B.H., 70 App. D.C. 95, 104 F.2d 227 (1939). The "law of the case" in this action is that the lower court does have jurisdiction of this action and Mr. Greene is personally liable and is in effect a party to this action if he was "possessed" of funds of the defendant-appellee at the time of service of the writ of attachment before judgment on him.

It is established law that the lower court, when it reacquires jurisdiction after remand, reacquires the authority to make any order and to take any action not inconsistent with the directions contained in the appellate court's mandate. (3 American jurisprudence, Appeal and Error, §§1219, 4233; Pyramid National Van Lines v. Goetze, 66 A. 2d 603 (Mun. Ct. App. D.C. 1949); 3 Moore's Federal Practice, par. 15.11). By Judge Keech's order (JA 20) the lower court did reacquire such jurisdiction to proceed in accordance with the mandate of this court.

The mandate of this Court does not answer important questions, such as, who had the initiative in instituting the proceedings for determination of "possession"? Could appellants amend as of right? How was the lower court to proceed? Accordingly, it must be assumed from the court's silence on these questions that this Court intended that the lower court should follow the general rule referred to above and take any action not inconsistent with the mandate of this court.

The most obvious procedure to correct a "gap in the record" after remand is to amend the pleadings to allege the missing facts. In this connection, it is emphasized that the defendant-appellant has not yet filed any responsive pleadings in this action, since a motion to dismiss is not a "responsive pleading" within the meaning of Rule 7(a) of the Federal Rules of Civil Procedure (3 Moore's Federal Practice, par. 15.07). Therefore, on remand of this action, appellants would have had the

absolute right to have amended the original complaint by amendments relevant to "possession" as a matter of course under Rule 15(a) if they had not filed a technical amendment correcting a minor factual error (JA 11) because the mandate of this Court does not specifically prohibit amendments of the pleadings and therefore could not deprive appellants of their rights under the Federal Rules without specific reason. A fortiori, therefore, the mandate of this Court does not prohibit amendments of the pleadings by leave of court which are relevant to the issues fixed by the mandate and which otherwise conform to the requirements of the Federal Rules of Civil Procedure.

The appellants therefore submit that the conclusion of the lower court that the mandate of this Court prohibits any amendments of the pleadings is totally wrong.

The principal cause of confusion in this case is the premature "finding" by the lower court at the oral examination concerning "possession" which is later discussed more fully. In effect, the lower court made its "finding" and then concluded, having made its "finding," that it no longer had any jurisdiction to allow any amendments of the complaint, relying on Britton v. Dowell, 243 F.2d 435 (C.C.A. 10, 1957).

Plaintiffs-appellants respectfully submit that the lower court misinterpreted the ruling in Britton v. Dowell, supra, and that the ruling in that case, correctly construed, supports the contentions of appellants in this action.

In that case, the plaintiff brought an action upon a note and obtained judgment. The defendant then appealed and the court reversed the judgment solely on the ground that the plaintiff had failed to allege and prove compliance with the provisions of the Oklahoma intangible property tax law, which compliance was a jurisdictional requirement and a necessary condition precedent to recovery on a cause of action based on a promissory note. The court's mandate in that case read:

" . . . vacated and cause remanded to the trial court with directions to determine compliance or non-compliance with the Oklahoma intangible property tax law and to enter judgment in accordance with such determination."

On remand, the defendant sought to amend his answer by pleading a new and different defense. The court denied defendant's motion for leave to amend his answer and determined the issue concerning payment of the intangible property tax in favor of the plaintiff and then entered judgment again for the plaintiff.

On appeal by the defendant from the denial of his motion for leave to amend his answer, the court said:

"Upon remand from an appellate court with a specific mandate the trial court is limited to the imperative of the mandate and is without jurisdiction to vary or extend it (citing cases). Appellant's proposed amendment did not affect the issues as limited by the mandate and was properly refused consideration by the trial court." (emphasis supplied).

It is first emphasized that the Britton case is the exact reverse of this case, since in this action a judgment for defendant was vacated on plaintiff's appeal and remanded for further proceedings with directions from this court. The Britton case is therefore not any authority at all for the proposition that the plaintiff, having obtained a reversal of a judgment dismissing his complaint, cannot thereafter amend his complaint on remand.

More importantly, the court in the Britton case recognizes by the necessary implication of the meaning of its quoted statement that any amendment of the pleadings, either by the plaintiff or the defendant, would be proper on remand if the amendment "affected" the issues on remand as limited by the appellate court's mandate. The Britton case therefore merely restates the general rule cited previously in this section of the brief.

In this action, the proposed amended complaint was and is specifically directed to the "jurisdictional fact" of "possession" which this Court directed the lower court to determine, as a reading of the proposed amended complaint will plainly show. Therefore, the proposed amended complaint in this does "affect" the issues as limited by the mandate of this Court in this action and should have been allowed instead of denied under the authority of the Britton case.

As a further question, if it be assumed that the plaintiffs-appellants had not taken any action under the oral examination discovery procedure with respect to garnishees, then how would the lower court have determined the issue of "possession?" The reason why this Court remanded this action was because of the gap in the record concerning the issue of "possession." Obviously, the only way the lower court could have cured the gap in the record in the assumed situation would have been by allowing amendment of the original complaint to show the applicable facts and law.

In this connection, it is true that there are cases holding that, where a plaintiff has had his complaint dismissed and then elected to stand on his pleadings by taking an appeal, the plaintiff thereafter may not amend his pleadings when the dismissal is affirmed on appeal. (3 American Jurisprudence, Appeal and Error, §1241). Again, that rule refers to the exact opposite of the situation in this action. Here, plaintiffs' complaint was dismissed in the court below and plaintiffs elected to stand on their pleadings on appeal and won. The order of dismissal was vacated and the case remanded for further proceedings. In such a situation, it has been held that the plaintiff may amend his pleadings on remand after appeal. (3 American Jurisprudence, Appeal and Error, Cum. Supp., 1961, Note 19). By the same token, plaintiffs-appellants here, having won the first appeal, should have been allowed to amend their original complaint to show all of the facts and applicable law determining the "jurisdictional fact" of "possession" in this action.

For the foregoing reasons, appellants respectfully urge and submit that the correct interpretation of the mandate of this Court is to permit amendments of the original complaint which are otherwise in compliance with the Federal Rules of Civil Procedure and that accordingly the order resulting in the dismissal of the complaint in the court below should be vacated and the case remanded for further proceedings.

II

THE "FINDING" BY THE COURT BELOW WAS PREMATURE AND HIGHLY PREJUDICIAL TO APPELLANTS BECAUSE IT DEPRIVED THEM OF THEIR STATUTORY RIGHT UNDER 16 D.C. CODE 317 TO TRIAL BY JURY OF THE "JURISDICTIONAL FACT" OF "POSSESSION" TO BE DETERMINED IN ACCORDANCE WITH APPLICABLE PRINCIPLES OF LAW.

As stated previously, the question of "possession" is a question of both fact and law (Bouvier's Law Dictionary, definition of "possession," Vol. 3, p. 2636 (8th ed.)). Counsel for appellants therefore decided first to obtain the correct facts by using the discovery procedure with respect to garnishees available under Title 16 of the District of Columbia Code. He therefore obtained court authority for oral examination of only one of the two garnishees in this case, the National Savings and Trust Company.

This Court well knows that it is established law in the District of Columbia that oral examination of a garnishee is merely a preliminary discovery procedure designed to enable the plaintiff to supplement the answers obtained by written interrogatories of the garnishee. (Young v. Nicholson, 70 App. D.C. 351, 107 F. 2d 177 (1939); Dickinson v. Brooks, 71 App. D.C. 106, 108 F. 2d 4 (1939); Troshinsky v. Feldman, 81 A. 2d 91 (Mun. Ct. App. D.C. 1951); Pinkston v. Briley, 118 A. 2d 185 (Mun. Ct. App. D.C. 1957)). If the plaintiff remains dissatisfied with the answers obtained from the garnishee concerning the funds or credits of the defendant thought to be in the "possession" of the garnishee, the plaintiff, after the oral examination, may file a traverse of the answers to the oral and written interrogatories and have, as a matter of statutory right, a trial by jury with respect to the question of such "possession." Troshinsky v. Feldman, supra.

When counsel for plaintiffs-appellants therefore decided, after having filed his motion for leave to amend, as previously stated, to continue with the oral examination of only one garnishee, the National Savings and Trust Company, for purpose of showing that Mr. Greene did in fact have physical "possession" of a portion of the proceeds of the U.S. Treasury check at the time of service of the writ of attachment, he did not in any way anticipate that the court below would attempt to make a "finding" concerning "possession" solely on the basis of the evidence elicited at that oral examination.

Accordingly, when the court below indicated that it would then decide the question of "possession" on the basis of that oral examination, counsel for appellants stated that the question of "possession" was not then before the court because the proceeding was merely an oral examination (Tr. 27) and he insisted in oral argument to the court that such a "finding" was premature. Counsel for appellants was overruled by the court below and the court made its "finding" and order conditionally dismissing the complaint (JA 35).

As the memorandum opinion dated June 1, 1961, of the court below shows (JA 36) the court below obviously thought that, having made its "finding," it then had no jurisdiction to permit amendments to the complaint. In effect, this ruling defeats the purpose of this Court in ordering the remand of this action with instructions because it prevented the court below from curing the gap in the record concerning "possession" by examining all of the pertinent facts and determining the "jurisdictional fact" of "possession" on the basis of applicable law.

More importantly, appellants still had the unexercised statutory rights to examine orally in court the other garnishee, Mr. Greene, and to demand a jury trial under 16 D.C. Code 317. The "finding" of the court below and its resulting refusal to permit amendment of the complaint cut off these statutory rights of the appellants and therefore constitutes error requiring reversal of the order reentering the order dismissing the complaint in this action. Troshinsky v. Feldman, supra.

III

THE PROPOSED AMENDED COMPLAINT IS A PROPER AMENDMENT OF THE ORIGINAL COMPLAINT IN ACCORDANCE WITH THE FEDERAL RULES OF CIVIL PROCEDURE WHICH RELATES BACK TO THE DATE OF FILING OF THE ORIGINAL COMPLAINT SO THAT THE REFUSAL OF THE COURT BELOW TO PERMIT THE PROPOSED AMENDMENT WAS HIGHLY PREJUDICIAL TO APPELLANTS AND IN VIOLATION OF THE SPIRIT AND MEANING OF THE FEDERAL RULES OF CIVIL PROCEDURE BECAUSE SUCH REFUSAL PREVENTED APPELLANTS FROM PRESENTING THEIR CASE TO SHOW THAT THE COURT BELOW HAS JURISDICTION OF THIS ACTION IN ACCORDANCE WITH THE DECISION OF THIS COURT IN THIS ACTION.

Since appellants respectfully urge that the court below misinterpreted the mandate of this Court and that the court below did have jurisdiction to grant the motion by appellants for leave to file an amended complaint and to summon additional parties, the question then becomes whether appellants' motion should have been granted by the court below and on its merits. This question involves many subsidiary problems which are treated in detail in the plaintiffs' Answer to defendant's Reply to Plaintiffs' Motion for Leave to Amend, etc. (Record; filed, May 4, 1961) and in plaintiffs' Motion for Reconsideration of Judgment Denying Leave to File an Amended Complaint, etc. (Record; filed, June 15, 1961). The arguments by appellants in support of their motion for leave to amend filed in the court below and contained in this record on appeal are incorporated in this brief by reference in order to avoid undue length of this brief.

As previously stated, appellants based their original complaint on the theory that Mr. Greene, as garnishee, had deposited the U. S. Treasury check with the National Savings and Trust Company for collection so that he had "possession" of funds of the defendant-appellee at the time when the writ of attachment before judgment was served on him. Having discovered that such an assumption was incorrect, that the U. S. Treasury check had been cashed, and that \$50,000 of the proceeds of the U. S. Treasury check had been conveyed by the defendant-appellee of Mr.

Greene and his partners, appellants then sought, by making the motion for leave to file an amended complaint, to change the theory of the action by alleging facts to show that the conveyance of the \$50,000 was a conveyance intended to hinder and delay creditors, the appellants here, which was null and void ab initio as a matter of law. If such allegations were sustained, then Mr. Greene and his partners did have "possession" of funds of the defendant-appellee at the time of service of the writ and the court below then would have jurisdiction of this action under the decision of this Court.

It is emphasized at the outset that 16 D.C. Code 326 provides that, if an attachment is based upon an alleged fraudulent conveyance, then the attachment may be levied upon the property alleged to have been so conveyed in the hands of the alleged fraudulent transferee as garnishee. It is also emphasized that, since the jurisdiction of the court below depends on the service of the writ of attachment and not upon the terms of the supporting affidavit, the affidavit may be amended (1 Flaherty, District of Columbia Practice, p. 407). The appellants therefore sought to allege facts showing a conveyance intended to hinder and delay creditors and later to amend the affidavit supporting the writs of attachment before judgment served upon both Mr. Greene and the National Savings and Trust Company. If the proposed allegations were sustained, then, as stated, the court below would have jurisdiction of this action under the "law of the case" rule. The proposed amendments were therefore specifically directed to and limited to the issue of the "jurisdictional fact" of "possession" as defined by this Court in its mandate.

The proposed amended complaint merely sought to allege additional facts with respect to the transaction attempted to be described in the original complaint, as a reading of the proposed amended complaint shows. Since the cause of action under the Federal Rules of Civil Procedure is determined by the operative facts, and not by the relief sought, the proposed amendment did not change the cause of action alleged in the original

action and therefore the proposed amendment would relate back under Rule 15(c) of the Federal Rules to the date of filing of the original complaint on October 16, 1959, thus giving the court below jurisdiction of this action. (5 Cyclopedia of Federal Procedure (2d ed.), sec. 1908 and cases there cited; 3 Moore's Federal Practice, par. 15.15; Goodacre v. Schulmier, 64 App. D.C. 10, 73 F.2d 519 (1934))

It is respectfully submitted that a reading of the proposed amended complaint shows that it sufficiently states a cause of action. It is established law that a complaint is sufficient under the Federal Rules if it sets forth facts which show the plaintiff is entitled to any relief which the court can grant, without regard to whether the plaintiff asked for the correct relief. (Keiser v. Walsh, 73 App. D.C. 167, 118 F.2d 13 (1940); Guth v. Texas Company, 155 F.2d 563 (C.C.A. 7, 1946); cert. denied, 332 U.S. 844, 849; Tahir Erk v. Glenn L. Martin Co., 110 F.2d 865 (C.C.A. 4, 1941)). Appellants respectfully urge that the proposed amended complaint does set forth showing appellants are entitled to relief.

This Court has held in this action that Mr. Greene, as garnishee, is personally liable and is therefore in effect a party to this action if it is determined that he had "possession" of funds of the defendant-appellee when he was served with the writ of attachment before judgment. The evidence elicited at the oral examination on April 17, 1961, of the National Savings and Trust Company shows that the \$50,000 "conveyed" to Mr. Greene and his partners by the defendant-appellee could have been withdrawn either by Mr. Greene or any one of his partners at any time (Tr. 20). Mr. Greene and his partners all maintain offices in the District of Columbia and therefore can be personally served with process in this action. Mr. Greene and his partners are certainly proper parties and perhaps indispensable parties to this action because they all have an interest in the \$50,000. Accordingly, it is respectfully submitted that it was proper under Rule 18 of the Federal Rules of Civil Procedure to join a claim for money due under a contract with a claim to set aside

the conveyance as fraudulent because in delay and hindrance of creditors and that it was proper under Rules 19 and 21 to seek to summon Mr. Greene and his partners as additional parties to this action.

Most importantly, it is now established law that a change in theory of the case after remand of a case does not prevent amendment of the complaint; is not a new cause of action; and should be permitted in keeping with the spirit and meaning of the Federal Rules of Civil Procedure to decide cases on the basis of the actual, operative facts.

A leading authority on the Federal Rules of Civil Procedure states:

"After appeal and remand of the case to the district court for further proceedings, new issues may be presented by amended pleadings not inconsistent with the judgment of the appellate court, if the mandate of the appellate court does not preclude amendment. The 'law of the case' rule does not prevent plaintiff from adopting a different theory of recovery in such a situation . . ." 3 Moore's Federal Practice, par. 15.11. (emphasis supplied)

As shown previously in this brief, the mandate of this Court does not preclude amendment of the complaint and the proposed amendment is consistent with the mandate of this Court in this action. Accordingly, it was proper for appellants to change the theory of the action after discovery of the correct facts concerning the negotiation of the U. S. Treasury check against which appellants assert a claim.

Important leading cases on this point have asserted the same rule stated by Moore. In International Ladies Garment Workers Union v. Donnelly Garment Co., 121 F.2d 561 (C.C.A. 8, 1941), the court allowed an amendment of the complaint after remand based on a new theory of the case and said:

"The Supreme Court of the United States has fixed the limits of permissible amendment with increasing liberality and has ruled that a change of the legal theory of the action is no longer accepted as a test of the propriety of a proposed amendment . . . Rule 15 of the Rules of Civil Procedure . . . expresses the same liberality with respect to the amendment of pleadings . . ." p. 563.

To same effect, Robbins v. Jordan, 86 U.S. App. D.C. 305, 181 F.2d 793 (1950); Guth v. Texas Co., 155 F.2d 563 (C.C.A. 7, 1946); cert. denied, 332 U.S. 844, 849.

This rule applies whether the amendments are made before or after remand because Rule 15 of the Federal Rules does not distinguish between amendment before or after remand. Emich Motor Corp. v. General Motors Corp., 229 F.2d 714 (C.C.A. 7, 1956).

Again, in another important case, McHenry v. Ford Motor Co., 269 F.2d 18 (C.C.A. 6, 1959), the court allowed an amendment of the complaint after remand to allege a new theory of the case, saying:

" . . . Barron and Holtzoff points (sic) out that it is generally agreed that a change in the legal theory of the action is not the test of propriety of an amendment to a pleading particularly in view of the prevailing practice of making final disposition of actions on the evidence rather than the pleadings . . ." p. 25.

The court in that case further said:

"As a general rule plaintiffs should be liberally allowed to set up new facts which are really part of the original case." p. 25.

The latter statement by the court in the McHenry case aptly and correctly describes the situation in this action.

Finally, it is now established that the Federal Rules of Civil Procedure mean and intend that the parties should be given the opportunity to present the case which they believe they have and should not therefore be prevented from doing so by over-technical or erroneous interpretations of orders of court. In another important case, Judge Charles Clark, who was chairman of the committee which drafted the Federal Rules of Civil Procedure when he was Dean of the Yale Law School, stated that plaintiffs cannot properly be denied the opportunity to present the case they believe they have. Markert v. Swift & Co., 173 F.2d 517 (C.C.A. 2, 1949). In that case, the court vacated the dismissal of the complaint by the lower court and allowed the plaintiffs to amend the complaint after remand. To same effect, Guth v. Texas Co., supra.

It is emphasized that this Court did not establish any "law of the case" concerning the "jurisdictional fact" of "possession" in this action, and therefore the amendment is proper under the doctrine stated in the Donnelly Garment Co. case. To same effect, Salvoni v. Pilson, 86 U.S. App. D.C. 727, 181 F. 2d 615 (1950); cert. denied, 339 U.S. 981.

Further, the proposed amendment cannot prejudice the defendant-appellee or Mr. Greene or his partners in any way because no responsive pleadings have yet been filed by the defendant in this case and accordingly ample opportunity would exist for the defendant-appellee and the proposed additional parties to defend against the allegations of the proposed amended complaint.

For the foregoing reasons, the refusal of the lower court to grant the appellants' motion for leave to file an amended complaint is in violation of the spirit and meaning of the Federal Rules of Civil Procedure.

CONCLUSION

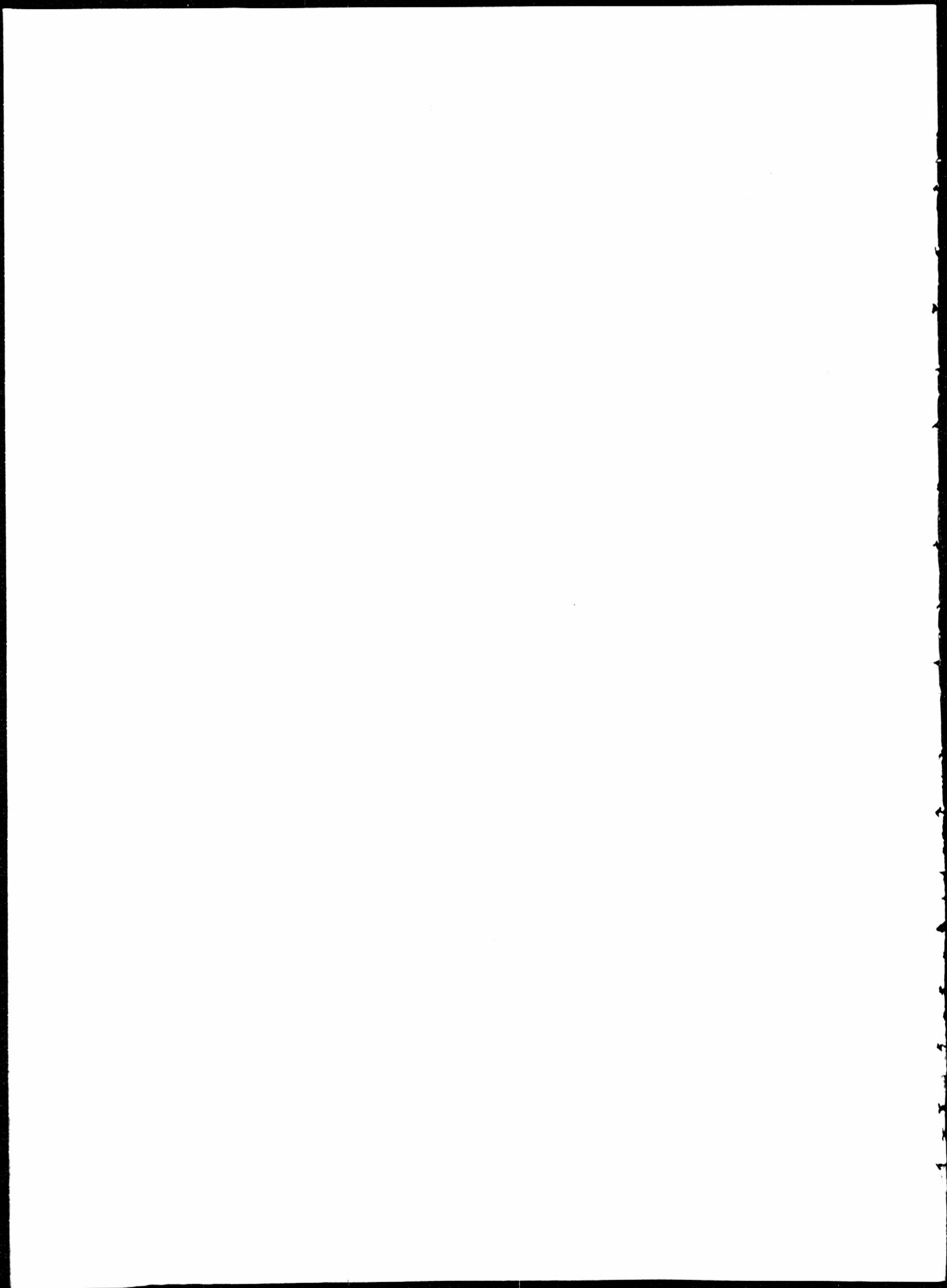
It is respectfully submitted on the basis of the foregoing argument that the correct interpretation of the mandate of this Court in this action does permit amendment of the complaint in this action as proposed by appellants and that the motion for leave to file an amended complaint and to summon additional parties was erroneously denied. Accordingly, the order reentering the previous order dismissing the complaint in this action for want of jurisdiction and quashing the writ of attachment before judgment should be vacated and this action should be remanded with instructions to the court below to allow amendment of the original complaint as proposed and amendment of the affidavit supporting the writs of attachment before judgment.

Respectfully submitted,

JOHN H. MacVEY

1025 Connecticut Avenue, N.W.
Washington 6, D. C.

Attorney for Appellants



(i)

INDEX

	<u>Page</u>
Complaint for Money due on a Contract, Filed October 16, 1959	1
Exhibit A -- Letter from American Pipe & Steel Corp. to Western Um Mfg. Co., dated June 4, 1959	3
Exhibit B -- Letter from William T. Sherwood, Jr., Esq. to Albert G. Greene, Esq., dated September 18, 1959	5
Affidavit of John H. Mac Vey in Support of Attachment Before Judgment	7
Attachment before Judgment, dated October 16, 1959	8
Notice	9
Interrogatories in Attachment Before Judgment	10
Amendment to Complaint, Filed October 26, 1959	11
Exhibit C -- Letter from Hoag & Galbally to American Pipe & Steel Corporation, dated September 22, 1959	12
Motion to Dismiss Complaint and Extend Garnishee's Time to Answer Written Interrogatories, Filed October 26, 1959	13
Points and Authorities, Filed October 26, 1959	14
Attachment before Judgment, dated October 31, 1959	15
Notice	16
Interrogatories in Attachment Before Judgment	17
Order Dismissing the Complaint, Filed November 13, 1959	18
Order Denying Motion to Vacate the Order Dismissing the Complaint and Quashing the Writ of Attachment and to Reinstate the Complaint and Writ of Attachment, Filed December 14, 1959	18
Notice of Appeal, Filed January 9, 1960	19
Order Vacating Order of Dismissal and Reinstating Complaint, Filed February 6, 1961	20
Order Authorizing Oral Examination of Garnishee and Issuance of Subpoenas Duces Tecum, Filed March 6, 1961	20
Motion for Leave to File Amended Complaint and to Summon Additional Parties, Filed April 17, 1961	21
Notice of Motion	23
Points and Authorities	23

	<u>Page</u>
Amended Complaint to Have a Conveyance Declared Void and For Money Due on a Contract	24
Exhibit A -- Letter from American Pipe & Steel Corporation to Western Um Manufacturing Co., dated June 4, 1959	31
Exhibit B -- Letter from Mr. William T. Sherwood, Jr., to Albert G. Greene, Esq., dated September 18, 1959	32
Exhibit C -- Letter from Hoag & Galbally to American Pipe and Steel Corp., dated September 22, 1959	34
Order for Dismissal of Complaint Subject to Certain Conditions, Filed April 20, 1961	35
Memorandum from Judge Matthew F. McGuire, Filed June 1, 1961	36
Order Denying Motion to File and Amended Complaint and Reentering Order of Dismissal Made by Judge Keech, dated November 13, 1959, Filed June 14, 1961	37
Order Denying Motion for Reconsideration of Judgment, etc., Filed June 27, 1961	38
Notice of Appeal, Filed July 24, 1961	38

JOINT APPENDIX

PLEADINGS AND DOCUMENTARY EVIDENCE

[Filed Oct. 16, 1959]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WESTERN URN MANUFACTURING COMPANY,	)	
and	)	
FARMER BROS. CO.,	)	
3828 South Main Street	)	
Los Angeles, California,	)	
	)	
Plaintiffs,	)	
vs.	)	Civil Action
	)	No. 2915-59
AMERICAN PIPE AND STEEL CORPORATION,	)	
2201 West Commonwealth Avenue,	)	
Alhambra, California,	)	
	)	
Defendants.	)	

COMPLAINT FOR MONEY DUE ON A CONTRACT

NOW COMES Western Urn Manufacturing Company and Farmer Bros. Co., by their attorney John H. MacVey, and represent to this Honorable Court as follows:

1. This Court has jurisdiction of this complaint under the provisions of Section 306 of Title 11 and Section 301 of Title 16 of the District of Columbia Code (1951 edition), the amount in controversy being more than \$3,000.00.

2. Plaintiffs are corporations organized and existing under the laws of the State of California having their principal place of business at 3828 South Main Street, Los Angeles, California.

3. Defendant is a corporation organized and existing under the laws of the State of Nevada, with its principal place of business located at 2201 West Commonwealth Avenue, Alhambra, California.

3. On or about June 4, 1959, defendant made an agreement with the plaintiffs to pay, upon the settlement by compromise of certain claims by the defendant in the U. S. Court of Claims against the United States, a promissory note in the amount of \$17,451.17 then due and owing to the plaintiffs from the defendant, together with interest thereon at the rate of 6% per year, and also to pay to the plaintiffs a proportionate amount of a claim against the United States filed in the U. S. Court of Claims by the defendant on behalf of the plaintiffs, which proportion was to be determined by the percentage ratio of the total amount of the claims against the United States to the amount received by defendants from the United States in compromise of the said claims. A copy of the said agreement dated June 4, 1959, is attached hereto and made part hereof as Exhibit A.

4. Certain of the said claims by the defendant against the United States, including the claim against the United States made on behalf of plaintiffs by the defendant, were settled by compromise, pursuant to which the U. S. Court of Claims entered a judgment against the United States in favor of the defendant herein in the amount of \$300,000.00. Money to pay such court judgment was appropriated by the Congress of the United States by Public Law 383, 86th Congress, First Session, approved September 28, 1959.

5. Demand has been made by the plaintiffs upon the defendant for payment of the money due under the said agreement dated June 4, 1959. No reply or other indication of intention to pay the money due to plaintiffs under said agreement has been received by plaintiffs and no payment has been made to plaintiffs by defendant pursuant to such demand. A copy of the said demand is attached hereto and incorporated herein as Exhibit B.

6. The amount of money now due and owing to the plaintiffs from the defendant pursuant to the said agreement dated June 4, 1959, is \$44,749.06, which amount is composed of \$25,866.89 representing the proportionate amount of the claim against United States filed by the defendant on behalf of the plaintiffs, and \$17,451.17 which is the amount of the promissory note now due and owing from the defendant to the

plaintiffs, and \$1,431.00 which is the interest due and owing to plaintiffs on the said promissory note.

WHEREFORE, THE PREMISES CONSIDERED, plaintiffs demand judgment against defendant in the total amount of \$44,749.06 and the costs of this action.

/s/ John H. MacVey

c/o William T. Sherwood, Jr.
824 Connecticut Avenue, N.W.
Washington, D.C.

District of Columbia: ss

John H. MacVey, being first duly sworn, deposes and says that he has read the foregoing complaint by him subscribed and that he verily believes the same to be true.

/s/ John H. MacVey

Subscribed and sworn to before me this 16th day of October, 1959.

/s/

Notary Public

My commission expires

[Filed Oct. 16, 1959]

EXHIBIT A

American Pipe & Steel Corporation
2201 W. Commonwealth Ave.
Alhambra, California

June 4, 1959

Western Urn Manufacturing Company
Farmer Bros. Co.
3828 South Main Street
Los Angeles, California

Gentlemen:

This has reference to the four Court of Claims cases which we now have pending in Washington being numbered 520-57, 445-57, 414-57 and 272-58 and which total \$897,765.00.

The latter case, as you know, was filed by us for the benefit of

Western Urn Manufacturing Company and is in the amount of \$50,849.00.

As you also know, we have made a lump sum compromise offer of settlement of these claims to the Government for the sum of \$500,000.00.

In the event we are able to make this compromise settlement, you agree to accept the sum of money that is represented by the percentage of your claim of \$50,849.00 as said claim relates percentagewise to the amount of settlement received by us for the four claims listed in paragraph one above in full settlement and satisfaction of said claim and of any other claim you could make against us arising out of or in connection with that certain contract between us dated May 20, 1954, and all amendments thereto.

In consideration of the above you agree to extend the note of this company in the amount of \$17,451.17 until a settlement of the above claims is made. In the meantime interest of 6% will be paid monthly and of course the note will be paid immediately that we receive funds of the settlement.

If the above is satisfactory to you, please indicate your agreement thereto by signing and returning to us the attached copy of this letter.

Very truly yours,

AMERICAN PIPE & STEEL
CORPORATION

By /s/

President

Accepted and Agreed:

WESTERN URN MANUFACTURING COMPANY

By: /s/

FARMER BROS. CO.

By: /s/

EXHIBIT B

William T. Sherwood, Jr.
Counsellor at Law
824 Connecticut Avenue, N. W.
Washington 6, D. C.

September 18, 1959

Albert G. Greene, Esq.
1000 Connecticut Avenue, N.W.
Washington 6, D. C.

Dear Mr. Greene:

As you know, your client, American Pipe and Steel Company, made a letter agreement dated June 4, 1959, with my client, Western Urn Manufacturing Company, Farmer Bros. Co., for a proportionate payment of the claim filed by your client on behalf of my client against the United States in the U. S. Court of Claims, No. 272-58. The agreement provides that such payment is to be made by your client if your client is able to effect a compromise of four claims, identified in the letter agreement, by your client against the United States. The consideration for this letter agreement is the extension by my client of the time for payment by your client of a promissory note given by your client to my client, the payment by your client of interest at 6% per month and the promise by your client to pay the promissory note in full immediately upon receipt of monies from the United States pursuant to the compromise settlement described in the letter agreement of June 4, 1959.

On September 4, 1959, the Department of Justice accepted a compromise settlement different from that described in the letter agreement of June 4, 1959. Under the new and different compromise settlement, the two claims, No. 414-57 and No. 520-57 in the total amount of \$538,882.00, were settled by the entry of judgment by the U. S. Court of Claims on September 8, 1959 for your client in the amount of \$300,000. Case No. 272-58 filed by your client on behalf of my client was dismissed by the same court order pursuant to the compromise settlement.

The Department of Justice refused to compromise the fourth claim, Case No. 445-57, in which your client claims \$302,272.00 from the United States, according to our information.

The percentage ratio of your proposed compromise settlement of \$500,000.00 to the total amount of the four claims identified in the letter agreement of June 4, 1959, of \$897,765.00 is approximately 55.68%. The percentage ratio of the compromise settlement approved by the Court of \$300,000.00 to the total amount of the three claims of \$589,731.00 is approximately 50.87%.

As mentioned, the consideration for the letter agreement dated June 4, 1959, is the extension of the time for your client to pay its note of \$17,541.17 to my client, plus monthly interest at the rate of 6% due on the amount of the note, and your client's promise to pay the note immediately upon receipt of funds of the settlement with the United States.

As you know, Congress has appropriated money to pay the judgment approved by the U. S. Court of Claims.

In accordance with the intent of the letter agreement dated June 4, 1959, and pursuant to instructions from my client, demand is hereby made for the payment of \$25,866.89, which represents 50.87% of \$50,849.00, the amount of the claim in Case No. 272-58, and for payment of \$17,451.17 and the interest in the amount of \$1,431.00 to September 15, 1959 due to my client pursuant to the said promissory note. The total amount hereby demanded is therefore \$43,318.06 plus interest due in the amount of \$1,431.00 or a total of \$44,749.06.

Demand is also made that payment of such amounts occur immediately upon receipt, either by your or by your client, of funds or U. S. Treasury check paid by the United States pursuant to the compromise settlement approved by the U. S. Court of Claims on September 8, 1959, and the Congressional appropriation.

Very truly yours,

/s/ William T. Sherwood, Jr.

WTS/sbb

AFFIDAVIT IN SUPPORT OF ATTACHMENT
BEFORE JUDGMENT

District of Columbia: ss

John H. MacVey, being first duly sworn, deposes and says:

1. He is an attorney at law admitted to practice in the District of Columbia and he is attorney of record for the plaintiffs in the above-entitled action.

This affidavit is submitted pursuant to the provisions of Rule 64 of the Federal Rules of Civil Procedure and of Section 301 of Title 16 of the District of Columbia Code (1951 edition) in support of issuance of a writ of attachment before judgment.

2. The complaint seeks recovery of \$44,749.06 now due and owing to the plaintiffs in this action pursuant to a contract between the plaintiffs and the defendant, as alleged in the complaint, which amount the plaintiffs have a just right to recover from the defendant.

3. Defendant is a foreign corporation organized and existing under the laws of the State of Nevada with its principal place of business located in Alhambra, California.

4. Plaintiffs file herewith a bond with good and sufficient security in twice the amount of the claim conditioned to make good to the defendant all costs and damages which the defendant may sustain by reason of the wrongful suing out of this attachment.

(Jurat)

Attachment before judgment.

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WESTERN URN MANUFACTURING
COMPANY and
FARMER BROS. CO.,

v. Plaintiff,

AMERICAN PIPE AND STEEL
CORPORATION,

Defendant.

Civil Action No. 2915-59

THE PRESIDENT OF THE UNITED STATES, TO THE MARSHAL FOR SAID
DISTRICT, GREETING:

You are hereby commanded to attach, seize, and take into your custody the
defendant lands and tenements, property and credits which shall be found in this
District, to the value of \$ 44,749.06
with interest _____

being the amount of the plaintiff's demand against the defendant, as shown by h
their affidavit, and claimed in htheir complaint, and the further sum of
\$ 20.00, for the costs and charges which may accrue in the premises;
and the same so attached, safely keep, subject to the orders of the Court, unless
the defendant or the person in whose possession the property is attached, deliver
to you, to be filed herewith, his undertaking, with sufficient surety or sureties to
abide by and perform the judgment of the Court in relation to said property. And
should you attach the defendant's property or credits in the possession of any
other person or persons than the defendant you shall notify such person or per-
sons of such seizure by virtue of this Writ of Attachment, and serve a notice upon
him or them as well as on said defendant, to appear in said Court on or before
the twentieth day, exclusive of Sundays and legal holidays, accruing after the serv-
ice of said notice, to show cause, if any there be, why the property or credits so
attached should not be condemned and execution thereof had.

WITNESS, The Honorable Chief Judge of said Court, the 16th
day of Oct., A.D. 19 59.

HARRY M. HULL, Clerk.
(By) /s/ Robert C. Huey
Deputy Clerk.

NOTICE

October 16 1959, 19__

To AMERICAN PIPE & STEEL CORPORATION, Defendant,
ALBERT H. GREENE, Garnishee.

You are hereby notified to appear in the District Court of the United States for the District of Columbia on or before the twentieth day, exclusive of Sundays and legal holidays, after service hereof, and show cause, if any there be, why the property, credits, of the said defendant, seized by virtue of the foregoing Writ of Attachment in the hands of Albert H. Greene, Garnishee (of which seizure the said garnishee is hereby notified), should not be condemned and execution thereof had.

/s/ Charles H. Ward, Jr.

U. S. Marshal.

MARSHAL'S RETURN

Attached as per schedule herewith and served defendant with a copy of this Writ and Notice prescribed by Section 446 of the Code.

_____, 19__

Attached credits, property of the defendant, in the hands of _____ Garnishee, and served said garnishee and defendant with copies of this Writ, Interrogatories, and the Notices Prescribed by Sections 446 and 456 of the Code.

_____, 19__

Defendant _____

 U. S. Marshal

Interrogatories in Attachment Before JudgmentUNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIAWESTERN URN MANUFACTURING COand FARMER BROS. CO.

Plaintiffs,

vs.

AMERICAN PIPE & STEELCORPORATION

Defendant .)

Civil) Court No. 2915-59
Municipal)

NOTICE

To Albert H. Greene, Garnishee :
1000 Connecticut Avenue, N.W.

You are required to answer the following interrogatories, under oath, within ten days after service hereof. And should you neglect or refuse so to do, judgment may be entered against you for an amount sufficient to pay the plaintiff's claim, with interest and costs of suit.

/s/ John H. MacVey

Attorney for Plaintiff .

INTERROGATORIES

1st. Were you at the time of the service of the writ of attachment, served herewith, or have you been, between the time of such service and the filing of your answer to this interrogatory, indebted to the defendant ? If so, how, and in what amount?

ANSWER: _____

2d. Had you, at the time of the service of the writ of attachment, served herewith, or have you had, between the time of such service and the filing of your answer to this interrogatory, any goods, chattels, or credits of the defendant in your possession or charge? If so, what?

ANSWER: _____

Subscribed and sworn to before me this _____ day of _____

A.D. 19 _____

[Filed Oct. 26, 1959]

AMENDMENT TO COMPLAINT

NOW COMES Western Urn Manufacturing Company and Farmer Bros., by their attorney, John H. MacVey, and represent to this Honorable Court as follows:

1. The last sentence of paragraph 5 of the said Complaint filed in the above-entitled action on October 16, 1959, is hereby amended to read as follows:

"Copies of the said demand are attached hereto and incorporated herein as Exhibits B and C."

2. Exhibit C is attached to and made a part of this amendment.

/s/ John H. MacVey

c/o William T. Sherwood, Jr.
824 Connecticut Ave., N.W.
Washington 6, D.C.

CITY OF WASHINGTON)
DISTRICT OF COLUMBIA) ss:

John H. MacVey, being first duly sworn, deposes and says that he has read the foregoing amendment to the complaint by him subscribed and that he verily believes the same to be true.

/s/ John H. MacVey

[Jurat]

[Filed October 29, 1959]

WILLIAM GALBALLY, JR.
HALLACK W. HOAG

EXHIBIT C

Law Offices of
Hoag & Galbally
510 South Spring Street
Los Angeles 13
* * *

September 22, 1959

Registered Return Receipt Requested

American Pipe and Steel Corporation
2201 Commonwealth
Alhambra, California

Gentlemen:

Under date of June 4, 1959, you entered into an agreement with Western Urn Manufacturing Company, Farmer Brothers Company, for a proportionate payment of the claim that you filed on behalf of Western Urn Manufacturing Company against the United States in the U. S. Court of Claims, No. 272-58. This letter agreement extended this time for payment of your 6% promissory note in the face amount of \$17,451.17 dated December 29, 1958 until a compromise settlement of certain claims against the United States (including claim No. 272-58) was effected.

On September 4, 1959, the Department of Justice accepted a compromise settlement of claims No. 414-57, No. 520-57 and No. 272-58. These claims total \$538,882.00 and they were settled for \$300,000.00. On September 8, 1959, a judgment thereon was entered by the United States Court of Claims. The percentage ratio of the compromise settlement by the Court is 50.87%. Subsequently, Congress appropriated money to pay the judgment approved by the U.S. Court of Claims.

Accordingly demand is hereby made upon you for the payment of \$25,866.89 which represents 50.87% of \$50,849.00 the amount of the claim in Case No. 272-58 and for payment of \$17,451.17 and interest in the amount of \$1,431.00 to September 15, 1959.

Demand is also made that payment of such amounts occur immediately upon receipt by you, of funds or U.S. Treasury Check paid by the United States pursuant to the compromise settlement approved by the U.S. Court of Claims on September 8, 1959 and the Congressional appropriation.

Yours very truly,
Hoag & Galbally

WG:s

[Filed Oct. 26, 1959]

**MOTION TO DISMISS COMPLAINT AND EX-
TEND GARNISHEE'S TIME TO ANSWER
WRITTEN INTERROGATORIES**

The defendant, appearing specially, and the Garnishee move this Court as follows:

1. To dismiss the action and quash the Writ of Attachment Before Judgment and return of written interrogatories on the ground that the jurisdiction of this Court is invoked under the provisions of Section 306 of Title 11 of the District of Columbia Code, and the complaint fails to set forth facts showing that the plaintiffs, the defendant, or either of them, is a resident, or found within the District of Columbia.

2. To dismiss the action and quash the Writ of Attachment Before Judgment and return of written interrogatories on the ground that if jurisdiction of this Court is invoked because the action arises under the Constitution and the Laws of the United States, the action is wrongfully brought. Neither plaintiff corporations, nor defendant, is a resident of the District of Columbia, nor licensed to do business, nor doing business within the District of Columbia.

3. To extend Garnishee's time to answer the written interrogatories served with the Writ of Attachment, until seventy-two (72) hours after the Court decides the question of jurisdiction raised by the defendant appearing specially, and in the event the Court finds that there is proper jurisdiction in this case, the Garnishee intends at that time to claim privilege.

/s/ Albert H. Greene,
Attorney for
AMERICAN PIPE AND STEEL
CORPORATION

Appearing Specially

/s/ Albert H. Greene, Garnishee
1000 Connecticut Ave.
Washington, D. C.

[Certificate of Service] _____

[Filed October 26, 1959]

POINTS AND AUTHORITIES

1. The complaint alleges that this Court has jurisdiction of this matter under the provisions of Section 306 of Title 11 of the District of Columbia Code.

2. It further alleges that the plaintiffs are corporations organized and existing under the laws of the State of California, having their principal place of business at 3828 South Main Street, Los Angeles, California, and that the defendant is a corporation organized and existing under the laws of the State of Nevada, with its principal place of business located at 2201 West Commonwealth Avenue, Alhambra, California.

3. From the allegations set forth in the complaint, it is patently evident that the Court does not have jurisdiction of this action which is one for money due on a contract, since the provisions of Section 306 of Title 11 state as follows:

"* * * and of all cases in law or in equity between parties, both or either of which shall be resident, or be found within said District * * *."

Neither the plaintiff corporations, nor the defendant corporation, is a resident, nor is to be found within said District within the meaning of the statute.

4. Furthermore, even under its jurisdiction as the United States District Court, aside from the jurisdiction it receives from the District of Columbia Code, the Court in this action would have no jurisdiction since this action could only be brought in the judicial district where all the plaintiffs reside, or in any judicial district in which the defendant is incorporated or licensed to do business or is doing business. 28 U.S.C. 1391.

5. The Writ of Attachment Before Judgment served on the Garnishee must be quashed on the principle that has been laid down by the courts in many instances to the effect that in the courts of the United States attachment is but an incident to a suit, and unless the suit can be maintained the attachment must fall. LaBorde v. Ubarri, 214 U.S. 173; Davis v. Ensign-Bickford Co., 139 F.2d 624.

Attachment before judgment.

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WESTERN URN MANUFACTURING
COMPANY and FARMER BROS. CO.

Plaintiffs .

vs.

AMERICAN PIPE AND STEEL
CORPORATION

Defendant .

Civil Action No. 2915-59

[Undertaking pltf for \$90,000.00
approved & filed 10/16/59]

THE PRESIDENT OF THE UNITED STATES, TO THE MARSHAL FOR SAID
DISTRICT, GREETING:

You are hereby commanded to attach, seize, and take into your custody the
defendant lands and tenements, property and credits which shall be found in
this District, to the value of \$ 44,749.06
with interest _____

being the amount of the plaintiffs demand against the defendant , as shown by their
affidavit, and claimed in their complaint, and the further sum of
\$ 20.00 , for the costs and charges which may accrue in the premises;
and the same so attached, safely keep, subject to the orders of the Court, unless
the defendant or the person in whose possession the property is attached, deliver
to you, to be filed herewith, his undertaking, with sufficient surety or sureties to
abide by and perform the judgment of the Court in relation to said property. And
should you attach the defendant's property of credits in the possession of any other
person or persons than the defendant you shall notify such person or persons of
such seizure by virtue of this Writ of Attachment, and serve a notice upon him
or them as well as on said defendant , to appear in said Court on or before the
twentieth day, exclusive of Sundays and legal holidays, accruing after the service
of said notice, to show cause, if any there be, why the property or credits so
attached should not be condemned and execution thereof had.

WITNESS, The Honorable Chief Judge of said Court, the 31st
day of Oct. , A.D. 19 59

(By)

HARRY M. HULL, Clerk.
/s/ Dean F. Miller
Deputy Clerk.

NOTICE

October 31, 19 59

To American Pipe and Steel Corporation, Defendant,
National Savings and Trust Company, Garnishee.

You are hereby notified to appear in the District Court of the United States for the District of Columbia on or before the twentieth day, exclusive of Sundays and legal holidays, after service hereof, and show cause, if any there be, why the property, credits, of the said defendant, seized by virtue of the foregoing Writ of Attachment in the hands of Nat'l Savings & Trust Co., Garnishee (of which seizure the said garnishee is hereby notified), should not be condemned and execution thereof had.

Charles H. Ward, Jr.

U.S. Marshal.

By Jeanette Anderson

MARSHAL'S RETURN

Attached as per schedule herewith and served defendant with a copy of this Writ and Notice prescribed by Section 446 of the Code.

_____, 19__

Attached credits, property of the defendant, in the hands of _____
 Garnishee, and served said garnishee and defendant with copies of this Writ,
 Interrogatories, and the Notices Prescribed by Sections 446 and 456 of the Code.

_____, 19__

Defendant _____

U. S. Marshal.

Interrogatories in Attachment Before JudgmentUNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIAFiled Nov. 6, 1959
Harry M. Hull, ClerkWESTERN URN MANUFACTURING)
COMPANY & FARMER BROS. CO.)

vs. Plaintiffs,)

Civil)
Municipal)Court No.
2915-59AMERICAN PIPE AND STEEL)
CORPORATION)

Defendant .)

NOTICE

To National Savings and Trust Company, Garnishee :

You are required to answer the following interrogatories, under oath, within ten days after service hereof. And should you neglect or refuse so to do, judgment may be entered against you for an amount sufficient to pay the plaintiff's claim, with interest and costs of suit.

/s/ John H. MacVey

Attorney for Plaintiff.

INTERROGATORIES

1st. Were you at the time of the service of the writ of attachment, served herewith, or have you been, between the time of such service and the filing of your answer to this interrogatory, indebted to the defendant ? If so, how, and in what amount?

ANSWER: No

2d. Had you, at the time of the service of the writ of attachment, served herewith, or have you had, between the time of such service and the filing of your answer to this interrogatory, any goods, chattels, or credits of the defendant in your possession or charge? If so, what?

ANSWER: No

3d. Have you participated in the negotiation of a U.S. Treasury check in the approximate amount of \$209,243.03 payable to American Pipe and Steel Corporation, and paid to or held for the account of Albert H. Greene, attorney in fact for said Corporation, any portion thereof?

Answer: Yes.

[Jurat]

National Savings and Trust Co.
By: Donald L. Scott (signed)

[Filed Nov. 13, 1959]

ORDER

The defendant, American Pipe and Steel Corporation, and the Garnishee, having moved this Court by a Notice of Motion for an order dismissing the complaint against the defendant corporation, and quashing the Writ of Attachment Before Judgment, together with return of written interrogatories, served on the Garnishee, on the ground that this Court lacks jurisdiction of the action, and said motion coming on to be heard on the 5th day of November, 1959.

Now, upon the reading of the papers of the defendant corporation and the Garnishee, submitted in support of said motion, and upon reading the plaintiffs reply to defendant's motion, submitted by plaintiff in opposition thereto, due deliberation having been had, and upon the ruling of the Court dated November 5, it is

ORDERED, that the complaint herein be dismissed for want of jurisdiction and the Writ of Attachment Before Judgment, together with written interrogatories, be quashed.

Dated November 13, 1959

/s/ Richmond B. Keech, U.S.D.J.

[Certificate of Service]

[Filed Dec. 14, 1959]

ORDER

The Plaintiffs, Western Urn Manufacturing Company and Farmers Bros. Co., having moved this Court by motion to vacate the order entered herein on November 13, 1959, dismissing the complaint herein for order of jurisdiction, and quashing the Writ of Attachment Before Judgment and to reinstate the complaint and Writ of Attachment herein.

Now, upon reading of the papers of the plaintiff corporations submitted in support of said motion, and upon reading the defendant's reply to plaintiffs' motion submitted by defendant in opposition thereto, due deliberation having been had, and upon the ruling of the Court dated

December 3, 1959, it is

ORDERED, That the motion to vacate the order dismissing the complaint and quashing the Writ of Attachment, and to reinstate the complaint and Writ of Attachment be, and the same is, hereby denied in all respects.

Dated: December 14, 1959

/s/ Richmond B. Keech, U.S.D.J.

[Certificate of Service]

[Filed Jan. 9, 1960]

NOTICE OF APPEAL

Notice is hereby given this 9th day of January, 1960, that Western Urn Manufacturing Company and Farmer Bros. Co. hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 14th day of December, 1959 in favor of American Pipe and Steel Corporation against said plaintiffs.

/s/ John H. MacVey

Attorney for
Western Urn Manufacturing Company
and Farmer Bros. Co.

[Filed February 6, 1961]

**ORDER VACATING ORDER OF DISMISSAL AND
REINSTATING COMPLAINT**

It appearing to this Court that the complaint in the above-entitled case was dismissed for want of jurisdiction and a writ of attachment before judgment, together with written interrogatories, was quashed by order of this Court dated November 13, 1959, and made by Judge Richmond B. Keech, and

It appearing that plaintiffs took an appeal from that dismissal to the U. S. Court of Appeals for the District of Columbia which Court, by its decision made on October 6, 1960, vacated the order of dismissal and remanded the case to this Court " . . . to the end that it be ascertained whether or not Greene had funds belonging to the appellee in his possession or was otherwise indebted to it at the time of the service of the writ of attachment . . . ";

NOW, THEREFORE, in accordance with the said decision by the U.S. Court of Appeals in this case, it is

ORDERED, That the aforesaid order of this Court dated November 13, 1959, be and it is hereby vacated and the complaint in the above-entitled case be and it hereby is reinstated for further proceedings in accordance with the said decision by the U.S. Court of Appeals.

/s/ Richmond B. Keech, U.S.D.J.

Dated: February , 1961

[Certificate of Service]

[Filed March 6, 1961]

**ORDER AUTHORIZING ORAL EXAMINATION OF
GARNISHEE AND ISSUANCE OF SUBPOENAS DUCES TECUM**

After having considered the motion by counsel for plaintiffs for oral examination of the National Savings and Trust Company as garnishee and the written opposition to that motion by counsel for defendant, and

After having heard oral argument by counsel on the motion, it is ORDERED, That counsel for the plaintiffs be and he hereby is authorized to examine orally representatives of the garnishee, National Savings and Trust Company, under oath in court concerning the negotiation of the U.S. Treasury check which is the subject matter of the writ of attachment before judgment served upon the National Savings and Trust Company in this action at a time and place to be fixed later, and to issue subpoenas duces tecum directed to the appropriate officials of the National Savings and Trust Company and to the appropriate official of the U. S. Department of the Treasury for the production of documents relevant to the delivery and negotiation of said check, and

FURTHER ORDERED, That defendant's prayer for dismissal of this action be and it hereby is denied without prejudice to renewal by defendant of its prayer after consideration by this Court of evidence concerning the issue in this case of "possession" of the said U.S. Treasury check.

/s/ Burnita S. Matthews, Judge

Dated: March 6, 1961

[Filed April 17, 1961]

**MOTION FOR LEAVE TO FILE AMENDED COMPLAINT
AND TO SUMMON ADDITIONAL PARTIES**

Plaintiffs by their attorney, John H. MacVey, respectfully move this Honorable Court for leave to file the amended complaint attached hereto and for an order summoning the individual defendants named in the said amended complaint as additional parties.

In support of this motion, plaintiffs respectfully show as follows:

1. Plaintiffs by their said attorney filed a complaint against the defendant, American Pipe and Steel Corporation, on October 16, 1959, and at the same time had issued and served on October 16, 1959, upon Albert H. Greene, attorney for the said defendant, as garnishee a writ of attachment before judgment. Later, on October 31, 1959, a writ of attachment before judgment was served upon the National Savings and Trust Company.

2. The original complaint in this action and the two aforementioned writs of attachment before judgment relate to a U. S. Treasury check in the approximate amount of \$209,243.03 payable to the defendant, American Pipe and Steel Corporation.

3. At the time when the original complaint was filed and the writ of attachment directed to the said Greene was issued on October 16, 1959, plaintiffs were ignorant of certain relevant facts which have importance concerning plaintiffs' ability to maintain their complaint. These facts were discovered only within the past two weeks by plaintiffs and accordingly plaintiffs did not allege all of the pertinent facts in their original complaint.

4. The claims asserted against the defendants in the amended complaint attached hereto arise out of the same series of transactions and involve questions of law and fact common to all of the defendants.

5. The allegations in the amended complaint attached hereto merely specify additional facts concerning the series of transactions attempted to be set forth in the original complaint.

6. Plaintiffs respectfully aver that the new facts contained in the plaintiff's amended complaint attached are necessary to enable the plaintiffs to prove their claims and that leave to file the amended complaint will therefore be in the furtherance of justice.

7. A part of the claims of the plaintiffs involves a petition to set aside a conveyance by the corporate defendant to the proposed additional individual defendants. Complete relief therefore cannot be granted in this action unless the said individuals named in the attached amended complaint are made parties.

8. The said proposed individual defendants can be found and personally served in the District of Columbia so that they can be made parties without depriving this Honorable Court of the jurisdiction which it now has in this action.

/s/ John H. MacVey
Attorney for plaintiffs
1025 Connecticut Avenue, N.W.
Washington 6, D. C.

NOTICE OF MOTION

To: American Pipe and Steel Corporation

Please take notice that plaintiffs in the above-entitled will file the foregoing motion for leave to file the proposed amended complaint attached to said motion and to summon additional parties, together with supporting points and Authorities, on April 17, 1961, for disposition in accordance with the rules of the U. S. District Court for the District of Columbia.

/s/ John H. MacVey
Attorney for plaintiffs

[Certificate of Service]

POINTS AND AUTHORITIES

1. Leave to amend shall be freely given when justice requires.

Rule 15(a) of the Federal Rules of Civil Procedure

2. A plaintiff may join as many claims, legal or equitable, as he may have against multiple parties, and particularly may join a claim for money and a claim to set aside a conveyance.

Rule 18(a) and 18(b) of the Federal Rules of Civil Procedure

3. When the amendment merely expands the description of the series of transactions attempted to be alleged in the original complaint, the amendment relates back to the date of the original pleading.

Rule 15(c) of the Federal Rules of Civil Procedure

Christensson v. Hogdal, 91 U.S. App. D.C. 251, 199
F. 2d 402 (1952)

Wiren v. Paramount Pictures, 92 U.S. App. D.C. 347,
206 F. 2d 465 (1952)

4. Parties may be joined at any time where claims are asserted against them which arise out of the same series of transactions which involve any question of law or fact common to all of the defendants.

Rules 20(c) and 21 of the Federal Rules of Civil Procedure

5. The modern Rule 15(a) of the Federal Rules of Civil Procedure is liberal in permitting amendment of pleadings to show that the court has jurisdiction

Christensson v. Hogdal, supra, at p. 254

AMENDED COMPLAINT TO HAVE A CONVEYANCE
DECLARED VOID AND FOR MONEY DUE ON A CONTRACT

NOW COMES Western Urn Manufacturing Company and Farmer Bros. Co., by their attorney, John H. MacVey, and represent to this Honorable Court as follows:

1. This Court has jurisdiction of this amended complaint by operation of the provisions of Section 401 of Title 12, Section 301 of Title 16, Section 108 of Title 13, Section 306 of Title 11, and Section 308 of Title 11 of the District of Columbia Code (1951 edition), the amount in controversy being more than the maximum of \$3,000.00 limiting the jurisdiction of the Municipal Court for the District of Columbia. This action is brought in this Honorable Court as the local court of unlimited original jurisdiction for the District of Columbia and not as a Federal Court, by operation of the aforesaid sections of the District of Columbia Code.

2. The original complaint in this action was filed in this Court on October 16, 1959, to which no responsive pleading has been made.

3. Plaintiffs are corporations organized and existing under the laws of the State of California having their principal place of business at 3828 South Main Street, Los Angeles, California. Western Urn Manufacturing Company is the wholly owned subsidiary of Farmer Bros. Co.

4. The corporate defendant is a corporation organized and existing under the laws of the State of Nevada, with its principal place of business located at 2201 West Commonwealth Avenue, Alhambra, California.

5. The individual defendants are individuals engaged in the practice of law representing themselves to the public as a partnership under the name of Ford, Larson, Greene & Horan having their principal office at 1000 Connecticut Avenue, N.W., Washington, D. C.

6. In the year 1957, the defendant, Albert H. Greene, acting for the defendant partnership of Ford, Larson, Greene & Horan, filed three petitions in the U. S. Court of Claims on behalf of the corporate defendant, American Pipe and Steel Corporation, for money claimed to be due to the corporate defendant from the United States under three separate contracts between the said corporate defendant and the United States. In the year 1958, the said defendant Greene, acting for the said defendant partnership, filed a petition in the U. S. Court of Claims on behalf of the said corporate defendant, the prime contractor with the United States, to the use of the plaintiff, Western Urn Manufacturing Company, the subcontractor of the said corporate defendant, for money claimed to be due from the United States under a fourth and separate prime contract between the United States and the said corporate defendant.

7. The petition by the said corporate defendant to the use of the said plaintiff filed as alleged aforesaid by the said defendant Greene was made at the instance of the plaintiffs in this action. ^{The said Greene} ~~William Galbally,~~ requested the ~~Jr., California legal counsel for the plaintiffs,~~ ^{to pay} ~~paid to the said corporate~~ defendant the sum of One Thousand Dollars (\$1,000.00) ~~in part~~ ^{in part} as payment, ~~of the fee for the legal services of the said individual defendant and the~~ said defendant partnership with respect to the petition in the U. S. Court of Claims by the said corporate defendant on behalf of the said plaintiff herein.

8. In the year 1958, the said Galbally and William T. Sherwood, Jr., Washington counsel for the said Galbally, consulted with the said defendant Greene, acting as aforesaid, concerning legal problems involved in the petition in the U. S. Court of Claims by the said corporate defendant on behalf of the said plaintiff. On or about February 11, 1959, the said defendant Greene acting as aforesaid filed an amended petition in the U. S. Court of Claims by the said corporate defendant on behalf of the said plaintiff.

9. On or about March 25, 1959, the said defendant Greene acting as aforesaid submitted to the Attorney General of the United States an offer to compromise and settle all four of the aforesaid petitions in the U. S. Court of Claims for a total of approximately \$500,000 on the first three claims by the said corporate defendant and dismissal of the claim by the said corporate defendant made on behalf of the said plaintiff.

10. The plaintiffs objected to the proposed offer of settlement made by the said defendant Greene, acting as aforesaid on behalf of the said corporate defendant and retained the said William T. Sherwood, Jr. on or about April 24, 1959, as their legal representative in Washington to protect further their interests with respect to said petitions in the U. S. Court of Claims made by the said corporate defendant on behalf of the said plaintiff. The said Sherwood then discussed the legal problems resulting from the aforesaid offer of compromise with the said defendant Greene acting as aforesaid and was informed by the said Greene that the said corporate defendant and the plaintiffs herein were in the process of negotiating an agreement among them as a result of the aforesaid offer of compromise with respect to the claim of the plaintiffs herein. The said Greene therefore suggested that any discussions between himself and the said Sherwood should be postponed until the results of such negotiations were known, with which suggestion the said Sherwood complied.

11. On or about June 4, 1959, the said corporate defendant as a result of the said negotiations did make an agreement with the plaintiffs whereby the said corporate defendant agreed to pay, upon the settlement by compromise with respect to the aforesaid petitions in the U. S. Court of Claims made by the said corporate defendant against the United States to plaintiff, a promissory note in the amount of \$17,481.17 then due and owing to the plaintiffs from the said corporate defendant together with interest thereon at the rate of 6% per year, and also to pay to the plaintiffs a proportionate amount of the said claim in the United States Court of Claims against the United States made by the said corporate defendant

on behalf of the said plaintiff, which proportion was to be determined by the percentage ratio of the total amount of the four claims against the United States to the amount received by the said corporate defendant from the United States in the event that the aforesaid offer of compromise was made successfully. A copy of the said agreement dated June 4, 1959, is attached hereto and made part hereof as Exhibit A.

12. Pursuant to the aforesaid suggestion by the said defendant Greene alleged in paragraph 10 of this amended complaint, the said Sherwood and John H. MacVey, attorney for the plaintiffs in this action, conferred on June 5, 1959, with the said Greene acting as aforesaid for the purpose of arranging to participate in the settlement negotiations then being conducted by the said Greene acting as aforesaid with the U. S. Department of Justice. Under the rules of the U. S. Court of Claims, plaintiffs had the legal right resulting from the said agreement of June 4, 1959, to intervene as interested parties in the said U. S. Court of Claims proceeding brought by the said corporate defendant on behalf of the said plaintiff and to participate as interested parties in the said settlement negotiations.

13. At the aforesaid conference on June 5, 1959, the said defendant Greene acting as aforesaid objected to participation by the said Sherwood and MacVey in the said settlement negotiations with the U. S. Department of Justice on behalf of the plaintiffs herein and the said Greene requested the said Sherwood and MacVey not to attempt to participate in the said settlement negotiations. In the expectation that the claim of plaintiffs herein would be paid pursuant to the said June 4, 1959 agreement if the said settlement negotiations were successful, the said Sherwood and MacVey waived the legal right of plaintiffs to intervene in the aforesaid U. S. Court of Claims proceeding and they agreed at said conference not to participate or attempt to participate in the said settlement negotiations in consideration of a promise made by the said Greene acting as aforesaid at said conference to keep the said Sherwood and MacVey informed concerning the course and results of the said

settlement negotiations. When the said Sherwood called the said Greene on the telephone after June 5, 1959, the said Greene told the said Sherwood to submit to him, the said Greene, a formal demand for payment of plaintiffs' claim under the said June 4, 1959 agreement when the Congressional appropriation to pay the U. S. Court of Claims judgment in settlement of the aforesaid claim by the said corporate defendant was approved.

14. A stipulation of settlement dated September 8, 1959, was signed by representatives of the U. S. Department of Justice and by the said Greene acting as aforesaid by which three of the four petitions referred in paragraph 6 of this amended complaint, including the dismissal of the said petition against the United States made by the said corporate defendant on behalf of said plaintiff, were settled by compromise pursuant to which the U. S. Court of Claims on September 8, 1959, entered a judgment against the United States in favor of the said corporate defendant herein in the total amount of \$300,000 which order also dismissed the aforesaid petition made by the said corporate defendant on behalf of the said plaintiff. Money to pay such court judgment was appropriated by the Congress of the United States by Public Law 303, 86th Congress, First Session, approved September 28, 1959.

15. When the said Sherwood and MacVey learned by their own initiative of the results of the settlement negotiations with the U. S. Department of Justice, written demand was made, in accordance with the instructions of the said Greene as alleged in paragraph 13 of this amended complaint, by the plaintiffs upon the said corporate defendant and upon the said defendant Greene acting as aforesaid for payment of the money due under the said agreement dated June 4, 1959. No reply or other indication of intention to pay the money to plaintiffs under said agreement was received by any representatives of the plaintiff herein and no payment was made to plaintiffs by the said corporate defendant pursuant to such demand before the original complaint was filed in this action on October 16, 1959. Copies of the said demand are attached hereto and incorporated herein as Exhibits B and C.

16. When the said Sherwood and MacVey learned by their own initiative that a U.S. Treasury check payable to the said corporate defendant in the approximate amount of \$209,243.03 was to be delivered to the said defendant Greene acting as aforesaid on October 16, 1959, in Washington, D. C., without any arrangements having been made by any of the defendants for payment of plaintiffs' claim then the original complaint in this action was filed in this Court on October 16, 1959, and a writ of attachment before judgment was served upon the said Greene as garnishee on October 16, 1959. Later a writ of attachment before judgment was served upon the National Savings and Trust Company as garnishee.

17. The said U.S. Treasury check payable to the said corporate defendant was endorsed on October 16, 1959, in Washington, D. C. by an authorized representative of the said corporate defendant at the office of the garnishee in this action, the National Savings and Trust Company, which negotiated the said U.S. Treasury check and which, at the instance of the said defendant Greene acting as aforesaid, credited \$50,000 of the proceeds of the said U.S. Treasury check to the account of the said defendant partnership with the said National Savings and Trust Company on October 16, 1959.

18. At no time after June 5, 1959, did the said defendant Greene acting as aforesaid inform the said Sherwood and MacVey as he had agreed to do, as alleged in paragraph 13 of this amended complaint. All information with respect to the said settlement negotiations and their results were obtained by the said Sherwood and MacVey acting on their own initiative without any information or assistance having been offered by the said defendant Greene, acting as aforesaid.

19. The actions by the said corporate defendant and by the said defendant Greene acting as aforesaid after September 8, 1959, as alleged in the preceding paragraphs of this complaint, including particularly the conveyance by the said corporate defendant of the said \$50,000 to the said defendant partnership, as alleged in paragraph 17 of this amended complaint, were done with the intent to hinder and

delay the payment of the just claim of the plaintiffs herein under the said agreement of June 4, 1959, and did hinder and delay the payment of such claim.

20. After the original complaint in this action was filed on October 18, 1959, the said corporate defendant paid the promissory note and interest due thereon, which are described in paragraph 11 of this complaint. Therefore, the amount of money now due and owing to the plaintiffs from the said corporate defendant in accordance with the said agreement dated June 4, 1959, is \$25,866.89 representing the proportionate amount of the claim against the United States made by the said corporation defendant on behalf of the plaintiffs.

WHEREFORE, THE PREMISES CONSIDERED,

(1) plaintiffs petition this Honorable Court to declare the aforesaid conveyance of \$50,000 by the said corporate defendant to the said defendant partnership void ab initio as to the plaintiffs in this action under the provisions of Section 401 of Title 12 of the District of Columbia Code (1951 edition) and to find that accordingly the said individual defendants jointly or severally, including the said defendant Greene individually had possession of a portion of the assets of the said corporate defendant at all times on October 16, 1959, after delivery of the said U. S. Treasury check to the said defendant Greene on October 16, 1959.

(2) plaintiffs petition that this Honorable Court direct that the bank account of the said individual defendants, jointly and severally, with the National Savings and Trust Company in the District of Columbia, is subject to the writ of attachment before judgment issued in this action on October 16, 1959, and personally served on October 16, 1959, on the said defendant Greene.

(3) plaintiffs demand judgment against the said corporate defendant in the total amount of \$25,866.89 and the costs of this action, and

(4) plaintiffs request such other relief as to this Honorable Court shall appear just and proper.

/s/ John H. MacVey

* * *

EXHIBIT A

AMERICAN PIPE & STEEL CORPORATION

June 4, 1959

Western Urn Manufacturing Company
Farmer Bros. Co.
3828 South Main Street
Los Angeles, California

Gentlemen:

This has reference to the four Court of Claims cases which we now have pending in Washington being numbered 520-57, 445-57, 414-57 and 272-58 and which total \$897,765.00.

The latter case, as you know, was filed by us for the benefit of Western Urn Manufacturing Company and is in the amount of \$50,849.00.

As you also know, we have made a lump sum compromise offer of settlement of these claims to the Government for the sum of \$500,000.00.

In the event we are able to make this compromise settlement, you agree to accept the sum of money that is represented by the percentage of your claim of \$50,849.00 as said claim relates percentagewise to the amount of settlement received by us for the four claims listed in paragraph one above in full settlement and satisfaction of said claim and of any other claim you could make against us arising out of or in connection with that certain contract between us dated May 20, 1954, and all amendments thereto.

In consideration of the above you agree to extend the note of this company in the amount of \$17,451.17 until a settlement of the above claims is made. In the meantime interest of 6% will be paid monthly and of course the note will be paid immediately that we receive funds of the settlement.

If the above is satisfactory to you, please indicate your agreement thereto by signing and returning to us the attached copy of this letter.

Very truly yours,

AMERICAN PIPE & STEEL
CORPORATION

By _____
President

Accepted and Agreed:

WESTERN URN MANUFACTURING COMPANY

By _____

FARMER BROS. CO.

By _____

EXHIBIT "B"

September 18, 1959

Albert G. Greene, Esq.
1000 Connecticut Avenue, N.W.
Washington 6, D.C.

Dear Mr. Greene:

As you know, your client, American Pipe and Steel Company, made a letter agreement dated June 4, 1959, with my client, Western Urn Manufacturing Company, Farmer Bros. Co., for a proportionate payment of the claim filed by your client on behalf of my client against the United States in the U. S. Court of Claims, No. 272-58. The agreement provides that such payment is to be made by your client if your client is able to effect a compromise of four claims, identified in the letter agreement, by your client against the United States. The consideration for this letter agreement is the extension by my client of the time for payment by your client of a promissory note given by your client to my client, the payment by your client of interest at 6% per month and the

promise by your client to pay the promissory note in full immediately upon receipt of monies from the United States pursuant to the compromise settlement described in the letter agreement of June 4, 1959.

On September 4, 1959, the Department of Justice accepted a compromise settlement different from that described in the letter agreement of June 4, 1959. Under the new and different compromise settlement, the two claims, No. 414-57 and No. 520-57 in the total amount of \$538,882.00, were settled by the entry of judgment by the U.S. Court of Claims on September 8, 1959 for your client in the amount of \$300,000.00. Case No. 272-58 filed by your client on behalf of my client was dismissed by the same court order pursuant to the compromise settlement.

The Department of Justice refused to compromise the fourth claim, Case No. 445-57, in which your client claims \$302,272.00 from the United States, according to our information.

The percentage ratio of your proposed compromise settlement of \$500,000.00 to the total amount of the four claims identified in the letter agreement of June 4, 1959, of \$897,765.00 is approximately 55.68%. The percentage ratio of the compromise settlement approved by the Court of \$300,000.00 to the total amount of the three claims of \$589,731.00 is approximately 50.87%.

As mentioned, the consideration for the letter agreement dated June 4, 1959, is the extension of the time for your client to pay its note of \$17,541.17 to my client, plus monthly interest at the rate of 6% due on the amount of the note, and your client's promise to pay the note immediately upon receipt of funds of the settlement with the United States.

As you know, Congress has appropriated money to pay the judgment approved by the U. S. Court of Claims.

In accordance with the intent of the letter agreement dated June 4, 1959, and pursuant to instructions from my client, demand is hereby made for the payment of \$25,866.89, which represents 50.87% of \$50,849.00, the amount of the claim in Case No. 272-58, and for payment of \$17,451.17 and the interest in the amount of \$1,431.00 to September 15, 1959 due to my client pursuant to the said promissory note. The total

amount hereby demanded is therefore \$43,318.06 plus interest due in the amount of \$1,431.00 or a total of \$44,749.06.

Demand is also made that payment of such amounts occur immediately upon receipt, either by you or by your client, of funds or U.S. Treasury check paid by the United States pursuant to the compromise settlement approved by the U. S. Court of Claims on September 8, 1959, and the Congressional appropriation.

Very truly yours,

/s/ William T. Sherwood, Jr.

WTS/sbb

EXHIBIT "C"

Law Offices of
HOAG & GALBALLY
510 South Spring Street
Los Angeles

September 22, 1959

Registered Return Receipt Requested

American Pipe and Steel Corporation
2201 Commonwealth
Alhambra, California

Gentlemen:

Under date of June 4, 1959, you entered into an agreement with Western Urn Manufacturing Company, Farmer Brothers Company, for a proportionate payment of the claim that you filed on behalf of Western Urn Manufacturing Company against the United States in the U. S. Court of Claims, No. 272-58. This letter agreement extended this time for payment of your 6% promissory note in the face amount of \$17,451.17 dated December 29, 1958 until a compromise settlement of certain claims against the United States (including claim No. 272-58) was effectuated.

On September 4, 1959, the Department of Justice accepted a

compromise settlement of claims No. 414-57, No. 520-57 and No. 272-58. These claims total \$538,882.00 and they were settled for \$300,000.00. On September 8, 1959, a judgment thereon was entered by the United States Court of Claims. The percentage ratio of the compromise settlement by the Court is 50.87%. Subsequently, Congress appropriated money to pay the judgment approved by the U. S. Court of Claims.

Accordingly, demand is hereby made upon you for the payment of \$25,866.89 which represents 50.87% of \$50,849.00 the amount of the claim in Case No. 272-58 and for payment of \$17,451.17 and interest in the amount of \$1,431.00 to September 15, 1959.

Demand is also made that payment of such amounts occur immediately upon receipt by you, of funds or U. S. Treasury Check paid by the United States pursuant to the compromise settlement approved by the U. S. Court of Claims on September 8, 1959 and the Congressional appropriation.

Yours very truly,

/s/ Hoag & Galbally

WG:s

[Filed April 20, 1961]

ORDER FOR DISMISSAL OF COMPLAINT
SUBJECT TO CERTAIN
CONDITIONS

The United States Court of Appeals for the District of Columbia Circuit, by its decision on appeal of this action made on October 6, 1960, having directed this Court to make a finding determining whether Albert H. Greene, a garnishee personally served with a writ of attachment before judgment in this action, was indebted to American Pipe and Steel Corporation, the defendant in this action, or was otherwise possessed of assets of the said defendant at the time of the service of said writ; and

An oral examination of the National Savings and Trust Company, the second garnishee in this action, having been held in this Court on April 17, 1961, pursuant to orders of this Court made on March 6, 1961,

and on March 20, 1961; and

It appearing that plaintiffs filed with this Court on April 17, 1961, before the beginning of the said oral examination, a motion for leave to file an amended complaint and to summon additional parties in this action, which motion is now pending in this Court,

Solely on the basis of the facts elicited under oath at the said oral examination on April 17, 1961, and of facts shown by the record of this action at the time of said oral examination, it is

FOUND That the said Albert H. Greene was not indebted to, and was not otherwise possessed of assets of, the said defendant in this action at the time when the said writ of attachment before judgment was personally served in the District of Columbia upon the said garnishee, Albert H. Greene; and it is

ORDERED That the complaint in this action shall be dismissed if and when it be determined that the allegations of the complaint in this action as proposed to be amended pursuant to the said pending motion for leave to file an amended complaint and to summon additional parties fail to show that this Court has jurisdiction of this action.

/s/ McGuire, Judge

Dated: April 20, 1961.

[CERTIFICATE OF SERVICE]

[Filed June 1, 1961]

Memorandum

Prescinding from the fact as to whether or not within the purview of the proposed amended complaint the defendant corporation is a necessary party, and therefore the Court is without jurisdiction, and also prescinding from the fact as to whether or not, apart from the circumstances above referred to, the amended complaint states a cause of action, the Court is of the opinion that leave to file the amended complaint must be denied.

Upon remand from an appellate court with a specific mandate the District Court is cabined by its terms and is without jurisdiction to vary or extend it.

Here the mandate is specific and unequivocal. "If the court shall find that Greene at the time of service of the writ was not indebted to the appellee or otherwise possessed its assets, the order of dismissal will be reentered."

See W. R. Britton v. Dowell, Inc., 243 F.2d 434 (1957) Tenth Cir.
Order accordingly.

/s/ Matthew F. McGuire
United States District Judge

June 1, 1961

[Filed June 14, 1961]

ORDER

The plaintiffs, Western Urn Manufacturing Company and Farmers Bros. Co., having moved this Court by motion for leave to file amended complaint,

Now, upon reading of the papers of the plaintiff corporations submitted in support of said motion and upon reading of defendant's papers in opposition thereto, due deliberation having been had and upon the ruling of the Court dated June 1, 1961 and

After this Court found that Albert H. Greene was not indebted to and was not otherwise possessed of assets of the said defendant American Pipe and Steel Corporation, at the time when the said writ of attachment before judgment was personally served, it is

ORDERED, that the motion to file an amended complaint be and the same is hereby denied in all respects, and it is

FURTHER ORDERED, that the Order of Dismissal made by Judge Richmond B. Keech, dated November 13, 1959 be and the same hereby is reentered.

/s/ Matthew F. McGuire
United States District Judge

[CERTIFICATE OF SERVICE]

[Filed June 27, 1961]

ORDER

Plaintiffs, Western Urn Manufacturing Company and Farmers Bros. Co., having moved this Court by motion for reconsideration of judgment denying leave to file an amended complaint, etc., and to vacate order dismissing complaint dated June 14, 1961 and reinstating Judge Richmond B. Keech's order dated November 13, 1959.

NOW, upon reading the papers of the plaintiff corporations submitted in support of said motion and upon reading of defendant's papers in opposition thereto, due deliberation having been had and upon ruling of the Court dated June 26, 1961, it is

ORDERED that the motion for reconsideration of judgment denying leave to file an amended complaint, etc., and to vacate order dismissing complaint be and the name is hereby denied in all respects.

/s/ Matthew F. McGuire

United States District Judge

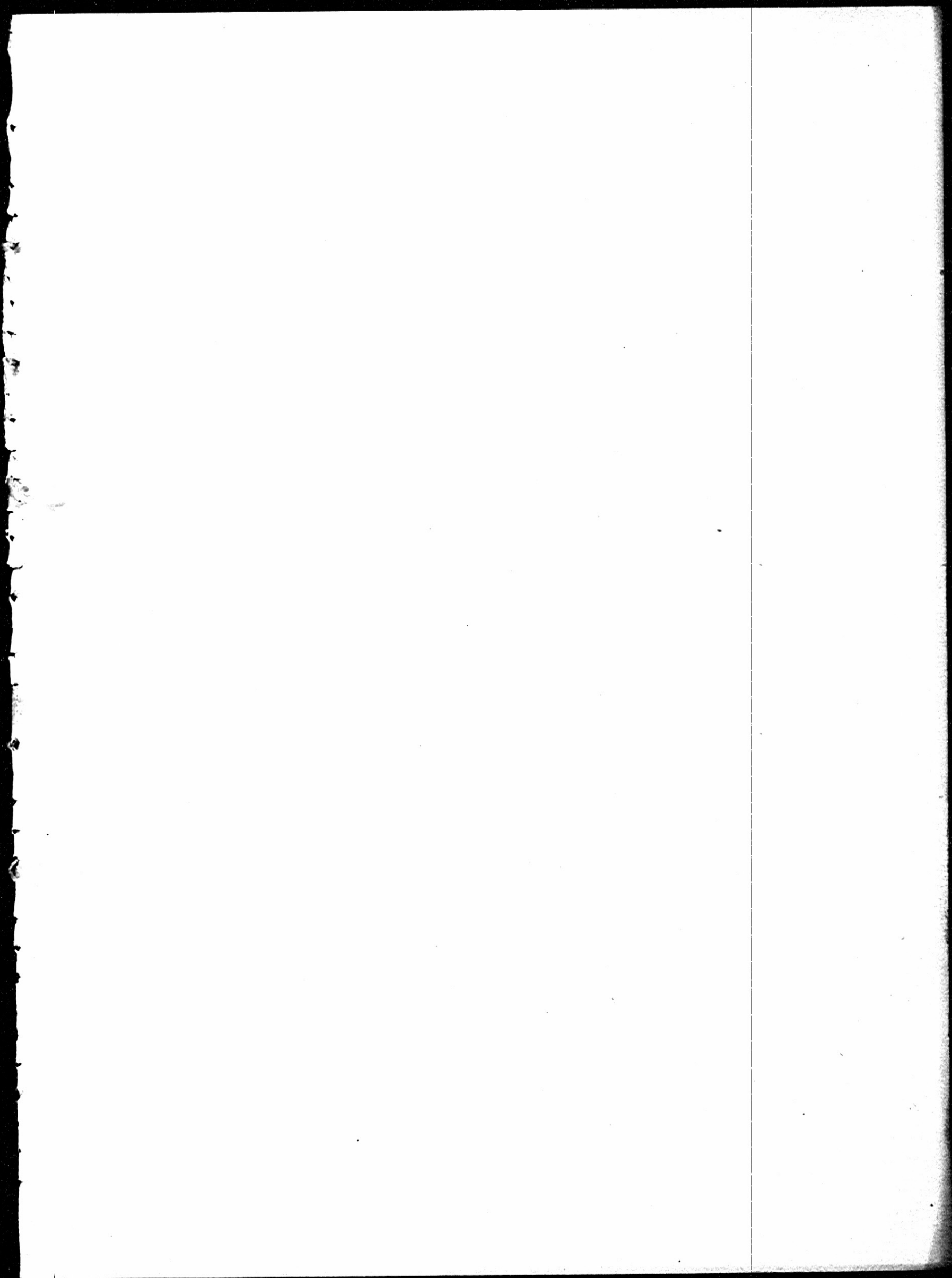
Dated:

[CERTIFICATE OF SERVICE] _____

NOTICE OF APPEAL

Notice is hereby given this 24th day of July, 1961, that Western Urn Manufacturing Company and Farmers Bros. Co. hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 27th day of June, 1961, in favor of American Pipe and Steel Corporation against said Western Urn Manufacturing Company and Farmers Bros. Co.

Attorney for Western Urn
Manufacturing Company and
Farmers Bros. Co.



160
*revise
renew*
BRIEF FOR APPELLEE

IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16,600

**WESTERN URM MANUFACTURING COMPANY, and
FARMER BROS. Co., Appellants,**

v.

AMERICAN PIPE & STEEL CORPORATION, Appellee

**Appeal from the United States District Court for the
District of Columbia**

**ALBERT H. GREENE
1000 Connecticut Avenue, N. W.
Washington 6, D. C.
Attorney for Appellee**

Of Counsel:

FORD, LARSON, GREENE & HOBAN

**United States Court of Appeals
For the
District of Columbia Circuit**

FILED

NOV - 6 1964

PRINTED BY BYRON S. ADAMS, WASHINGTON, D. C.

Joseph W. Stewart
CLERK

STATEMENT OF QUESTION PRESENTED

On this appeal there is only one question which is before the Court, whether or not the lower Court followed the mandate of this Court.

INDEX

	Page
Counter Statement of the Case	1
Statutes Involved	4, 5
Summary of Argument	5
 Argument	
I. The District Court was bound by the terms of the mandate of the upper Court and could do nothing inconsistent with the decision of the Court of Appeals	7
II. Amendment of a complaint is within the sound discretion of the trial judge	10
III. The finding of the trial court is supported by substantial evidence and cannot be overruled unless clearly erroneous	13
Conclusion	16

CASES CITED

Armour & Co. v. B. F. Bailey, Inc., 132 F. 2d 386 (5th Cir. 1949)	15
Blanc v. Spartan Tool Co., 178 F. 2d 316 (8th Cir. 1940) ..	8
Briggs v. Pennsylvania Railroad Co., 334 U.S. 305	8
Britton v. Dowell, 243 F. 2d 434 (10th Cir. 1957)	8, 9, 10
Brooks v. Marbury, 11 Wheat (U.S.) 78	14
Coleman v. United States, 85 U.S. App. D.C. 145, 176 F. 2d 469 (1949)	15
Equitable Life Assurance Soc. v. Mercantile-Commerce Bank & Trust Co., 155 F. 2d 776 (8th Cir. 1946) ..	12
Fleniken v. Great American Indemnity Co., 142 F. 2d 938 (5th Cir. 1944)	7
Fornello v. Delegrannis Bros., 180 F. 2d 553 (7th Cir. 1950)	15
Hall v. National Supply Co., 270 F. 2d 379 (5th Cir. 1959)	11
Hannan v. Hardee, 63 App. D.C. 76, 69 F. 2d 394 (1934)	14
Hibernia Savings & Loan Soc. v. Belcher, 4 Cal. 2d 268, 48 F. 2d 681 (1935)	14

	Page
Huntress v. Estate of Carroll Huntress, 235 F. 2d 205 (7th Cir. 1956)	15
International Ladies Garment Workers Union v. Don- nelly Garment Co., 121 F. 2d 561 (8th Cir. 1941)	11, 12, 13
Manello v. Bornstine, 270 P. 2d 1059 (Wash. 1954)	14
Marcus v. Hudgins, 168 Md. 79, 176 Atl. 271 (1935)	14
Martin v. United States, 96 U.S. App. D.C. 294, 225 F. 2d 945 (1955)	15
McHenry v. Ford Motor Co., 269 F. 2d 18 (6th Cir. 1959)	11, 12
Merillat v. Hensey, 221 U.S. 333, affmg. 32 App. D.C. 64	15
Messelt v. Security Storage Co., 14 FRD 507 (D.C. Del. 1953)	9
Pinkston v. Briley, 128 A. 2d 185 (Mun. Ct. App. D.C. 1957)	13
Sheridan-Wyoming Coal Co. v. Krug, 84 U.S. App. D.C. 288, 172 F. 2d 282 (1949)	10
Tahir Erk v. Glenn L. Martin Co., 110 F. 2d 865 (4th Cir. 1941)	13
Troshinsky v. Feldman, 81 A. 2d 91 (Mun. Ct. App. D.C. 1951)	13
Voliva v. Bennett, 201 F. 2d 434 (5th Cir. 1953)	10
Western Urn Mfg. Co. & Farmers Bros. Co. v. Ameri- can Pipe & Steel Corporation, U.S. App. D.C. , 284 F. 2d 279 (1960)	2, 7

STATUTES CITED

11 D.C. Code 308 (1951 ed.)	4
12 D.C. Code 401 (1951 ed.)	4
16 D.C. Code 301 (1951 ed.)	4
16 D.C. Code 326 (1951 ed.)	5

IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16,600

WESTERN URN MANUFACTURING COMPANY, and
FARMER BROS. Co., *Appellants*,

v.

AMERICAN PIPE & STEEL CORPORATION, *Appellee*

Appeal from the United States District Court for the
District of Columbia

BRIEF FOR APPELLEE

COUNTER STATEMENT OF THE CASE

The plaintiff-appellant on October 16, 1959 filed a complaint in the United States District Court for the District of Columbia against the defendant-appellee, American Pipe & Steel Corporation, alleging certain monies due and owing pursuant to letter agreement entered into on June 4, 1959 (J.A. 1). Plaintiff-appellant, knowing that the District Court for the District of Columbia would not have jurisdiction of this matter since neither corporation was organized or doing business within the District of Columbia, proceeded by issuing a writ of attachment against Albert H. Greene, under the impression that said Greene, a member of the law firm of Ford, Larson, Greene & Horan with offices at 1000 Connecticut Avenue, was in possession

of funds belonging to defendant-appellee which were within the jurisdiction of the local District Court. A writ of attachment and interrogatories were served on garnishee Greene at 4:15 P.M. on October 16, 1959. The garnishee did not answer the interrogatories (J.A. 10) but appeared specially and filed a motion to dismiss and quash the writ of attachment, contending that the court did not have jurisdiction. The lower Court granted the motion and dismissed the action for lack of jurisdiction (J.A. 18). The plaintiff then appealed from the order of the lower Court (J.A. 19).

On October 6, 1960 the Court of Appeals for the District of Columbia reversed the decision of the lower Court dismissing the complaint of the plaintiff for lack of jurisdiction and quashing the writ of attachment. *Western Urn Mfg. Co. & Farmers Bros. Co. v. American Pipe & Steel Corporation*, 284 F. 2d 279, U.S. App. D.C. (1960). In its opinion the Court of Appeals stated that the local jurisdiction of the District Court in this matter is the same as the local jurisdiction of a state court, in that the jurisdiction asserted was not one based on a federal question or diversity of citizenship, but grounded on the presence of a *res* within the jurisdiction. *Western Urn Mfg. Co. & Farmers Bros. Co. v. American Pipe & Steel Corporation*, *supra*, at 281. Under this theory of jurisdiction, the writ of attachment would lie against garnishee Greene if at the time of service he was possessed of funds belonging to the defendant, against whom the plaintiff alleged a claim.

Inasmuch as the record up to that time did not disclose whether or not Mr. Greene, when served, still had in his possession funds of the appellee, or was otherwise indebted to it (284 F. 2d at 282), the appellate Court was unequivocal in its remand, for it specifically stated,

"Since there is no showing as to the state of his indebtedness to the appellee at the time the writ was

served, we will vacate the order of dismissal *to the end* that it be ascertained whether or not Greene had funds or was otherwise indebted to it at the time of the service of the writ of attachment. If the Court shall find that Greene at the time of the service of the writ was not indebted to the appellee or otherwise possessed of its assets, the order of dismissal will be reentered." 284 F. 2d at 283.

In compliance with the mandate of this Court, the lower Court on March 6, 1961 issued an order authorizing an oral examination of the garnishee, National Savings and Trust Company, and issuance of a subpoena duces tecum (J.A. 20). On April 17, said oral examination was held and the Court at that time heard the evidence of Mr. Gordon T. Hegdahl, Fiscal Officer for the Bureau of Accounting (Tr. 3), and Mr. William H. Ford, Assistant Treasurer for the National Savings and Trust Company (Tr. 6). At said hearing the following facts were established:

- (1) That Mr. Greene did receive U. S. Government check in the sum of \$209,243.03 made payable to the American Pipe & Steel Corporation from the Bureau of Accounting, U. S. Treasury Department;
- (2) That Mr. Greene accompanied by Mr. Jack Lane, President of the American Pipe & Steel Corporation, proceeded to the garnishee Bank where the president of the defendant corporation presented to Mr. Ford a Board resolution of the American Pipe & Steel Corporation authorizing its President to cash the check and pay to the firm of Ford, Larson, Greene & Horan the sum of \$50,000 due as legal fees. (Tr. 15)
- (3) That a second check drawn on the Security First National Bank of Los Angeles was remitted to Mr. Lane for the balance (Tr. 11), and that the entire transaction was handled as a cash transaction (Tr. 23);

- (4) That the said transaction took place between 1:15 and 1:30 P.M. on October 16, 1959, (Tr. 18) while Mr. Greene was not served with the writ of attachment until 4:15 P.M. the afternoon of the 16th. (Tr. 25).

From these facts the lower Court determined in accordance with the mandate of the Court of Appeals that at the time of the service of the writ, Greene was not in possession of the funds or otherwise indebted to the defendant (J.A. 35-37).

On the day of the oral examination, counsel for the plaintiff filed a motion for leave to file an amended complaint. This motion was denied on June 14, 1961 in light of the facts elicited at the oral examination and in the record. (J.A. 37) Appellant now contends that in dismissing this motion to amend the complaint the District Court was in error.

STATUTES INVOLVED

11 D. C. Code 308 (1951)

No action or suit shall be brought in the United States District Court for the District of Columbia by original process against any person who shall not be an inhabitant of, or found within the District except as otherwise specially provided.

12 D. C. Code 401 (1951)

Every conveyance or assignment, in writing or otherwise . . . with the intent to hinder, delay or defraud creditors . . . shall be void . . . *Provided*, that nothing herein shall be construed to affect or impair the title of a purchaser for valuable consideration . . .

16 D. C. Code 301 (1951)

In any action at law in the District Court of the United States for the District of Columbia or the Municipal Court

of said District, for the recovery of . . . a debt, or damages for the breach of a contract, express or implied, if the plaintiff, his agent or attorney, either at the commencement of the action or pending the same shall file an affidavit showing the grounds of his claim and setting forth that the plaintiff has a just right to recover what is claimed in his declaration . . . and also stating either, first that the defendant is a foreign corporation or is not a resident of the District, . . . the clerk shall issue a writ of attachment and garnishment, to be levied upon so much of the . . . credits of the defendant as may be necessary to satisfy the claim of the plaintiff: *Provided* That the plaintiff shall first file in the clerk's office a bond . . . in twice the amount of his claim

16 D. C. Code 326 (1951)

If the ground upon which an attachment is applied for be that the defendant has assigned, conveyed, or disposed of his property with intent to hinder, delay, or fraud his creditors, the attachment may be levied upon the property alleged to be so assigned or conveyed in the hands of the alleged fraudulent assignee or transferee, as a garnishee.

SUMMARY OF ARGUMENT

It is respectfully submitted that the lower Court in reinstating the order of November 13, 1959 dismissing the plaintiff's complaint for lack of jurisdiction did so in exact compliance with the direction of the Court of Appeals. From the facts presented at the oral examination on April 17, 1961 there was substantial evidence upon which the Court could determine, as it was directed, whether or not the garnishee Greene had any funds or was otherwise indebted to the defendant. It was clear from the testimony gathered at the oral examination that Mr. Greene was not possessed of funds or otherwise indebted to American Pipe & Steel Corporation. Such a finding cannot be overruled

unless clearly erroneous or unsupported by substantial evidence.

Likewise, the denial of a motion to file an amended complaint cannot be asserted as error unless there has been abuse of sound discretion by the court. The court cannot be said to have abused its discretion in denying the motion to amend for several reasons:

(1) The mandate of the court and the law of the case narrowed the issue to a factual determination of jurisdiction whether Greene had funds or was otherwise indebted.

(2) From the testimony at the oral examination the Court had sufficient facts upon which to determine that there was no *res* over which the Court had jurisdiction.

(3) The amendment of the complaint to allege fraud was unsubstantiated in light of facts elicited at the examination.

ARGUMENT

PRELIMINARY STATEMENT

In order for the appellant to invoke the jurisdiction of the District Court for the District of Columbia, certain facts were assumed. These facts are stated on page 12 of Appellant's Brief, namely that Mr. Greene had a power of attorney from the appellee to endorse the U.S. Treasury check and deposit the same for collection by his bank and that thereafter he would, when the check had been collected, deduct the amount of his legal fee from the amount of the U.S. Treasury check and then send a certified check for the balance to the appellee. It was on this theory and on this assumption of the facts as aforementioned that appellant decided to institute an action in the District Court for the District of Columbia on the basis that there was a *res* within the jurisdiction of the District Court.

However, since Mr. Greene did not act as counsel for appellant assumed he would, and did not possess any funds belonging to the appellee or was otherwise indebted to it, appellant's *in rem* theory collapsed for a lack of a *res*. The appellant now wishes to commence a new action based on fraud. Appellant considers the payment of a legal fee a fraudulent conveyance intended to hinder and delay creditors. The only basis for such an allegation lies in the fact that the manner in which garnishee Greene dealt with his client was not the way counsel for the appellant would have done it or the way he assumed that it was done. The only delay with respect to this alleged creditor is the delay caused by counsel for appellant in trying to institute a lawsuit in the District of Columbia where none does in fact exist.

I.

The District Court Was Bound By the Terms of the Mandate and Could Do Nothing Inconsistent With the Decision of the Court of Appeals

When the Court of Appeals reversed and remanded the case to the lower Court, it did so with one specific question in mind—whether or not there was a *res* over which the lower Court could exercise jurisdiction. 284 F. 2d at 283. On the record there were not sufficient facts from which it could be “ascertained whether or not Greene had funds belonging to the appellee in his possession or was otherwise indebted to it at the time of the service of the writ of attachment”, 284 F. 2d at 283. This question alone was before the District Court on remand.

The law in this area is well settled that further proceedings in the trial court are controlled by the mandate of the Court of Appeals and the Court may take no action inconsistent with the directions as elucidated by the opinion. *Fleniken v. Great American Indemnity Co.*, 142 F. 2d 938 (5th Cir. 1944). When the mandate is clear and specific the lower Court is cabined by its terms and any attempt

to vary or extend such a mandate is reversible error. *Briggs v. Pennsylvania Railroad Co.*, 334 U.S. 305; *Britton v. Dowell*, 243 F. 2d 434 (10th Cir. 1957).

The appellant contends that it should have been permitted to amend the complaint. It cites as authority Professor Moore (App. Brief 23-24) and *International Ladies Garment Workers Union v. Donnelly Garment Co.*, 121 F. 2d 561 (8th Cir. 1941), and *Guth v. Texas Co.*, 155 F. 2d 563 (7th Cir. 1946) (App. Brief 23-24). The appellant's contention is not well taken. What the appellant suggests is more than merely changing the theory of the case, it is attempting to change the entire character of the action. Such a proposal is clearly inconsistent with the mandate of this Court. The opinion of the Court of Appeals expressing the law of the case (*Blanc v. Spartan Tool Co.*, 178 F. 2d 104 (7th Cir. 1950)) indicates the matter to be determined. At "sometime" on October 16, 1959 funds came into possession of Mr. Greene, 284 F. 2d at 283. It is now the duty of the lower Court to determine "at what time".

The determination as to "at what time" garnishee Greene had any funds belonging to appellee was all that the lower Court tried to elicit. However, appellant would have the lower Court allow it to change its cause of action. The original complaint filed by the appellant was one for money due and owing on an alleged contract, basing the jurisdiction of the District Court on the presence within the District of Columbia of certain assets against which the appellant could satisfy its alleged claim. Now the appellant seeks not only to amend but also to bring in new parties, namely the law firm of Ford, Larson, Greene & Horan, never before the Court or served with process. Furthermore, appellant alleges new facts not before pleaded or present in its original complaint. An amendment bringing in a new party does not relate back to the time of filing of the original complaint but is

akin to filing a new action against a new party. *Messelt v. Security Storage Company*, 14 FRD 507 (D.C. Del. 1953).

It is one thing to change the theory of a case where a court already has jurisdiction but another to add new parties and allege new facts. As was stated in the *Donnelly* case, relied upon so heavily by appellant, amendment should be permitted where

"the amendment introduced no new or different cause of action, nor did it set up any different state of facts, as the ground of action"

A fortiori since the appellant's proposed amendment does allege new and different facts and a new cause of action it should not be permitted to be asserted.

The District Court was well aware of these principles when, in its memorandum opinion, it cited the Tenth Circuit case of *Britton v. Dowell*, 243 F. 2d 435 (10th Cir. 1957). The brief of the appellant states the District Court misinterpreted that case. (App. Brief 15) To create a distinction it offers the absurdity that one rule of law should apply to plaintiffs and another to defendants.

The mandate of the court in *Britton* specifically stated that the purpose for remand was "to determine compliance or non-compliance with the Oklahoma tangible property tax law and to enter judgment in accordance with such determination." (243 F. 2d at 434) In the trial court after the case was remanded, the defendant sought to amend his answer and raise a new defense. This motion was denied. "Upon remand from an appellate court with a specific mandate the trial court is limited to the imperative of the mandate and is without jurisdiction to vary or extend it." 243 F. 2d at 435. The appellant has stated that the case impliedly held that if the amendment bore on the issue it would be allowed. The language relied upon is merely *dicta*. The court in each case remanded the case for a finding of specific facts and in each case the appellant sought to add something new, outside the scope of the

mandate and the contemplation of the appellate court. In each case the amendment was rightfully *refused* because it did not affect the issue on remand.

In the light of the foregoing principles it clearly would have been inconsistent with the mandate of the appellate court to permit an amendment which would have added new parties and new facts and which would have extended the mandate to include consideration of a new jurisdictional basis.

II.

Amendment of a Complaint Is Within the Sound Discretion of the Trial Judge

The appellant has argued in its brief that since the mandate of the Court did not specifically preclude amendment and since the Federal Rules of Civil Procedure encourage great liberality in amendment, the trial Court was in error in denying the proposed amendment. It has already been shown that the mandate of the Court did preclude the suggested amendment but *assuming that it did not*, the lower Court was correct for the following reasons.

1. It is elementary that the trial court has wide discretion in respect to amendments which are not of right, *Sheridan-Wyoming Coal Co. v. Krug*, 84 U.S. App. D.C. 282, 172 F. 2d 282 (1949), and while the rules do encourage liberality in granting amendment, their granting is within the sound discretion of the trial judge. *Voliva v. Bennett*, 201 F. 2d 434 (5th Cir. 1953). From the facts learned at the oral examination, facts which the plaintiff himself asserts to be true (App. Brief 12), there could be no abuse of discretion in denying the proposed amendment. From the completed record the questions raised by the Court of Appeals and the proposed complaint were answered. The allowance of amendments lies in the discretion of the trial court and refusal to permit amendment is not subject to review on appeal except for abuse of sound

discretion. *Hall v. National Supply Co.*, 270 F. 2d 379 (5th Cir. 1959).

2. In all the cases cited by the appellant to substantiate its position, it is to be noted that amendment was allowed in the lower court in actions where *jurisdiction was already established* and the authority of the courts was not questioned.

The appellant has relied principally upon *International Ladies Garment Workers' Union v. Donnelly Garment Co.*, 121 F. 2d 561 (8th Cir. 1941), and *McHenry v. Ford Motor Co.*, 269 F. 2d 18 (6th Cir. 1958) to support his contention. Yet these cases can be distinguished and thereby demonstrate the error in the appellant's argument.

In *Donnelly* the plaintiff company had brought an action against the defendant union based on the Sherman Act *which established Federal jurisdiction*. The defendant moved to dismiss for lack of jurisdiction. This motion was denied and judgment returned in favor of the plaintiff. On appeal the *question of jurisdiction* was raised and the Court of Appeals determined that the court was without jurisdiction. At that point the appellee sought to amend its complaint to allege diversity of citizenship thereby establishing a jurisdictional base. The Court of Appeals said that "Rule 15 of the Civil Procedure, . . . expresses the same liberality with respect to amendment of pleadings," at 563. However, "since amendment cannot be allowed by this Court, it necessarily follows that we cannot direct or instruct the court below *with respect* to its *discretion* in granting or denying leave to make such an amendment as is suggested", at 563. The Court specifically held:

"We have decided the question of the jurisdiction of the District Court under the Sherman Act, . . . , the only question before us on appeal; and to that extent only have we established the law of the case. If that ruling stands and if no amendment . . . is allowed by

the court below, the complaint must be dismissed for want of jurisdiction." (121 F. 2d at 563)

The case was therefore reversed and remanded for proceedings not inconsistent with the opinion of this Court. While it is true that the lower court permitted amendment it did so at its own discretion and because it was not precluded by the *general* language of the mandate.

The appellant further states that the court in *McHenry v. Ford Motor Co.*, *supra*, permitted amendment of the complaint on remand and is indicative of the judicial temperament of liberal amendment. The Court in the *McHenry* case did allow amendment but for distinguishable reasons: (1) The motion was to file an amended and supplemental complaint stating events occurring after the filing of the original complaint, 269 F. 2d at 24; (2) the Court reversed and remanded the case with directions that "the plaintiff be permitted to serve and file appropriate amended and supplemental complaint . . .", 269 F. 2d at 25; (3) that the facts comprising the new theory on amendment were contained in the original complaint, 269 F. 2d at 25.

From distinguishing these two cases the following conclusions can be drawn. First the lower court has discretion in the matter of amendment on remand when the language of the mandate is general, i.e., proceeding not inconsistent with the opinion of this Court. *International Ladies Garment Workers Union v. Donnelly Garment Co.*, *supra*, or where the case has not been remanded for a limited purpose but for a new trial. *Equitable Life Assurance Soc. v. Mercantile-Commerce Bank & Trust Co.*, 155 F. 2d 776 (8th Cir. 1946).

Amendment is likewise permitted where so provided by the specific mandate of the Court. It is to be noted that where amendment is permitted the complaint is in some way defective, i.e., failure to state a cause of action, *Tahir*

Erk v. Glenn L. Martin Co., 110 F. 2d 865 (4th Cir. 1941). In all these cases the court has already had jurisdiction over the parties. The appellate Court has yet to permit amendment absent the proper jurisdiction, see *Donnelly, supra*.

The appellant contends that it has been deprived of its rights under the attachment procedures established by the District of Columbia statutes by the lower courts premature finding. This argument is incorrect. The appellant cites as authority *Troshinsky v. Feldman* 81 A. 2d 91 (Mun. Ct. App. D.C. 1951) and *Pinkston v. Briley* 128 A. 2d 185 (Mun. Ct. App. D.C. 1957) (App. Brief 18). These cases are distinguishable. The facts in each case are different from those presented in this case. In each case the party claiming deprivation of his statutory rights took some action which amounted to a denial of the facts. In *Troshinsky* the party *had traversed* the findings and *after traverse* was denied his right to a full hearing; likewise in *Pinkston* the garnishee was bound by an order of the court after he had raised a factual issue by amending his answer to interrogatories upon which there was no hearing. The appellant in this case *did not traverse the findings, it did not deny the truth*. In fact, by its own affirmance in the record on query by the Court it acknowledged that the money received by the garnishee was a legal fee (Tr. 10). (App. Brief 12)

III.

The Finding of Trial Court Is Supported By Substantial Evidence and It Cannot Be Overruled Unless Clearly Erroneous

The appellant contends that facts learned prior to the oral examination held on April 17, 1961 necessitated an amendment changing the theory of the case to fraud so that any conveyance to Greene would have been void *ab initio* and therefore the \$50,000 in the possession of Greene would be subject to attachment. Such a theory as pro-

posed by the appellant is not substantiated by the law or facts of the situation.

Merely because a debtor prefers one creditor over another does not make the transaction a fraudulent conveyance. A debtor has the right to prefer one creditor over another even if such preference defeats other creditors. *Brooks v. Marbury*, 11 Wheat (U.S.) 78; *Hannan v. Hardee*, 63 App. D.C. 76, 69 F. 2d 394. A transfer of property to an attorney for past services rendered is valid against existing creditors even if it amounts to a preference. *Marcus v. Hudgins*, 168 Md. 79, 176 Atl. 271 (1935); *Hibernia Savings & Loan Soc. v. Belcher*, 4 Cal. 2d 268, 48 F. 2d 681 (1935). Further, it has been held that even if the debtor were insolvent, payment of a legal fee for services is supported by valuable consideration. *Manello v. Bornstine*, 270 P. 2d 1059 (Wash. 1954), and therefore not a fraudulent conveyance.

The appellant's own statement of the facts (App. Brief 12) indicates that there was no fraud and no possession.

"The president of the defendant-appellee came to Washington, D. C. where he endorsed the check which was cashed by the National Savings & Trust Company on October 16, 1959, at which time he conveyed \$50,000 of the proceeds of said check to Greene and his partners."

The only fact omitted in this statement is that the conveyance was a fee for legal services, which fact was put in evidence at the oral examination (Tr. 10). The transaction in question is consistent with honest purposes, and is not a fraudulent conveyance, merely because another creditor is hindered or delayed. *Merillat v. Hensey*, 221 U.S. 333, affirming 32 App. D.C. 64.

On the basis of the facts learned at oral examination there was substantial evidence upon which the Court could make its determination. The law is clear that the judgment of the trial court based upon findings in an action

tried without a jury would be affirmed where the finding was not clearly erroneous, and based upon substantial evidence. *Coleman v. United States*, 85 U.S. App. D.C. 145, 176 F. 2d 469 (1949); *Fornello v. Delegrannis Bros.*, 180 F. 2d 553 (7th Cir. 1950). Further, a trial court's fact findings supported by evidence are not clearly erroneous and cannot be disturbed on appeal. *Martin v. United States*, 96 U.S. App. D.C. 294, 225 F. 2d 945 (1955).

Further, appellee submits that what the appellant now proposes by its amended complaint is procedurally incorrect. The appellant by its amended complaint has attempted to join new parties and allege that there has been a fraudulent conveyance in order to establish jurisdiction for its original and amended complaint. This manner of obtaining jurisdiction is to say the least questionable. As has been stated in several cases the Federal Rules permit joinder of a fraudulent conveyance action and a claim against the debtor where each action is separately maintainable. However, what the appellant suggests is an *in personam* action to establish an *in rem* action. By its express terms this rule (18(b)) contemplates a joinder of the action to set aside the conveyance with the action to establish the claim, the former being ancillary to and dependent on the latter, and the debtor being an indispensable party. *Armour & Co. v. B. F. Bailey, Inc.*, 132 F. 2d 386 (5th Cir. 1949); see also *Huntress v. Estate of Carroll Huntress*, 235 F. 2d 205 (7th Cir. 1956).

CONCLUSION

It is respectfully submitted that the District Court followed correctly the mandate of this Court and committed no error when it denied the appellant's motion for leave to file an amended complaint. To grant the appellant's request for reversal and remand would be prejudicial to the appellee. It would in effect be to permit a new trial

when the question of jurisdiction* has not yet been decided. For these reasons the decision of the District Court dismissing the complaint for lack of jurisdiction and denying motion to file an amended complaint should be affirmed.

Respectfully submitted,

ALBERT H. GREENE
1000 Connecticut Avenue
Washington, D. C.

Attorney for Appellee

Of Counsel:

FORD, LARSON, GREENE & HORAN
1000 Connecticut Avenue
Washington 6, D. C.

* As the lower court stated in its memorandum opinion "prescinding from the fact as to whether or not within the purview of the proposed amended complaint the defendant corporation is a necessary party, and therefore the Court is without jurisdiction, and also prescinding from the fact as to whether or not, apart from the circumstances referred to, the amended complaint states a cause of action . . ." (J.A. 36).

IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16,600

WESTERN URN MANUFACTURING COMPANY, AND
FARMERS BROS. Co., *Appellants,*

v.

AMERICAN PIPE & STEEL CORPORATION, *Appellee.*

**Appeal From the United States District Court for the
District of Columbia**

PETITION FOR REHEARING

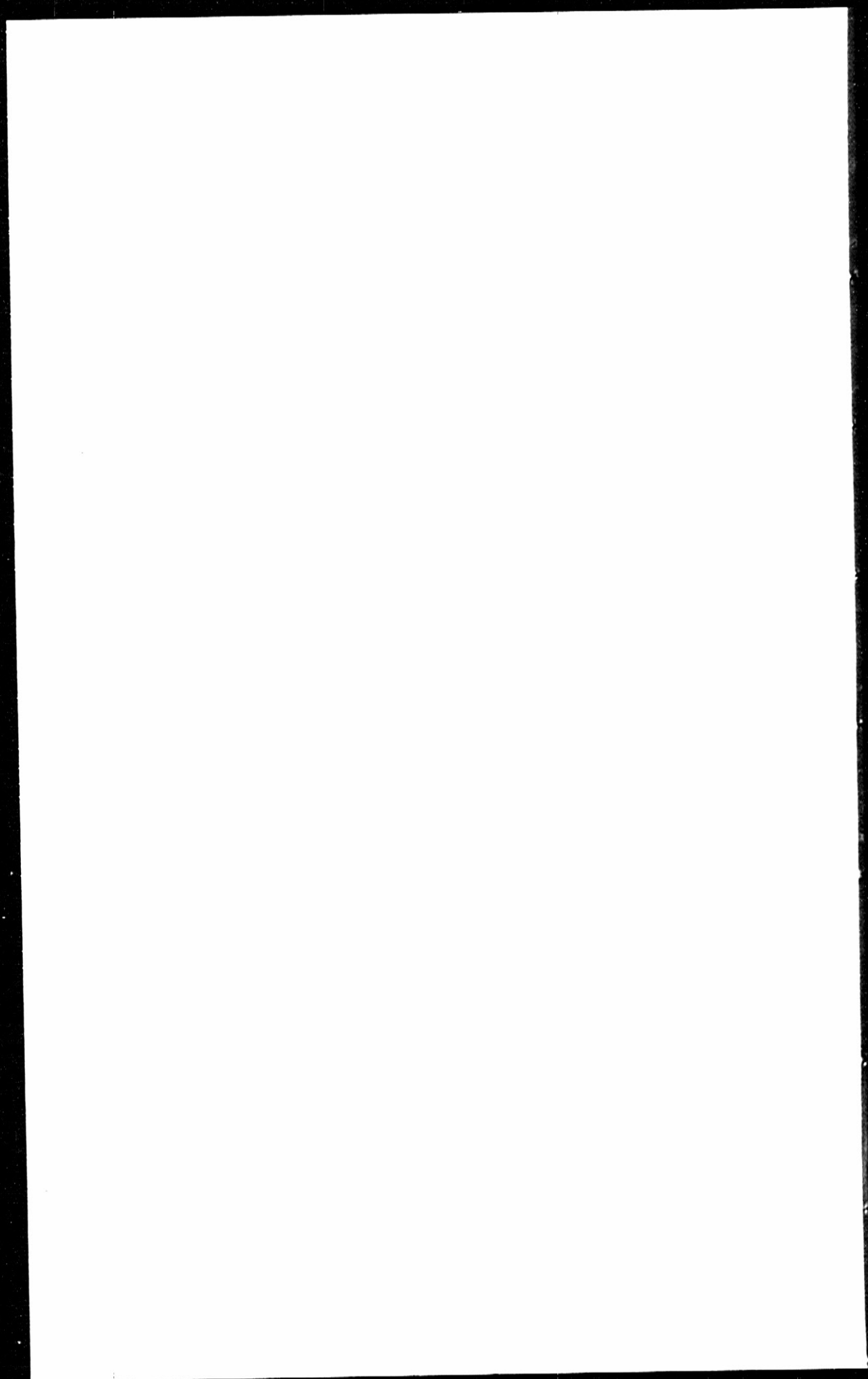
United States Court of Appeals—
for the District of Columbia Circuit

FILED MAY 12 1962

PEYTON FORD
1000 Connecticut Avenue
Washington 6, D. C.
Attorney for Appellee

Joseph W. Stewart
Of Counsel
CLERK

FORD, LARSON, GREENE & HORAN
1000 Connecticut Avenue
Washington 6, D. C.



IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16,600

WESTERN URN MANUFACTURING COMPANY, AND
FARMERS BROS. Co., *Appellants*,

v.

AMERICAN PIPE & STEEL CORPORATION, *Appellee*.

Appeal From the United States District Court for the
District of Columbia

PETITION FOR REHEARING

In its decision of April 12, 1962, this Court ruled that the appellants be permitted to file their proposed amended complaint in the District Court. This Court's decision seems to be largely based upon facts asserted by the appellants. The picture thus presented is not accurate.

Western Urn Manufacturing Company, the appellant, seeks by its amended complaint to show that some duty

was owed to it and that appellee, American Pipe & Steel Corporation, conveyed \$50,000 to its attorneys, Ford, Larson, Greene & Horan with the intent to hinder and delay. Appellants basis for its allegations is its interpretation of a letter agreement entered into between appellant and appellee on June 4, 1959. The following is the letter agreement referred to:

"June 4, 1959

"Western Urn Manufacturing Company
Farmer Bros. Co.
3828 South Main Street
Los Angeles, California

"Gentlemen:

"This has reference to the four Court of Claims cases which we now have pending in Washington being numbered 520-57, 445-57, 414-57 and 272-58 and which total \$897,765.00.

"The latter case, as you know, was filed by us for the benefit of Western Urn Manufacturing Company and is in the amount of \$50,849.00.

"As you also know, we have made a lump sum compromise offer of settlement of these claims to the Government for the sum of \$500,000.00.

"In the event we are able to make this compromise settlement, you agree to accept the sum of money that is represented by the percentage of your claim of \$50,849.00 as said claim relates percentagewise to the amount of settlement received by us for the four claims listed in paragraph one above in full settlement and satisfaction of said claim and of any other claim you could make against us arising out of or in connection with that certain contract between us dated May 20, 1954, and all amendments thereto.

"In consideration of the above you agree to extend the note of this company in the amount of \$17,451.17 until a settlement of the above claims is made. In the meantime interest of 6% will be paid monthly and of course the note will be paid immediately that we receive funds of the settlement.

"If the above is satisfactory to you, please indicate your agreement thereto by signing and returning to us the attached copy of this letter.

"Very truly yours,

AMERICAN PIPE & STEEL
CORPORATION

By
President

"Accepted and Agreed:

WESTERN URN MANUFACTURING COMPANY

By

FARMER BROS. Co.

By"

As a result of this letter appellants allege in their amended complaint that they had a right to intervene as a party in the United States Court of Claims proceeding and to participate as an interested party in the said settlement negotiations. First of all, the action commenced in the Court of Claims, as reflected in the second paragraph of the letter above referred to, was filed in the name of American Pipe & Steel Corporation for the use and benefit of Western Urn Manufacturing Company. It is therefore difficult to understand the allegation made by appellants to the effect that as a result of the aforementioned letter agreement it had a right to intervene. It was already in the Court of Claims proceeding. It further alleges that it had a right to participate in the settlement negotiations and that Greene had objected to Sherwood and MacVey, counsel for Western Urn, participating in settlement negotiations with the U. S. Department of Justice. The amended complaint itself alleges that on March 25, 1959 Greene submitted to the Attorney General of the United States an offer to compromise and settle the matters pending in the Court of Claims for a total of \$500,000. There were no further negotiations to be had except an acceptance or turn-down of the offer of compromise by the Department of Justice. Referring back to the aforementioned letter,

it must be noted that American Pipe & Steel Corporation offered to pay the appellant an amount of money proportionate to a lump sum settlement of the cases which it had then pending against the United States and totalling alleged claims in the amount of \$897,765.00. The offer of March 25, 1959 offering to compromise all the aforementioned claims for a sum of \$500,000.00 *was rejected by the United States Government*. From June until early September discussions were had with the Government, of which appellants were fully apprised. On September 8, 1959, a stipulation of settlement was entered into between appellee and the United States Government settling two of the claims. The third, the one in which Western Urn had an interest, appellee covenanted not to sue on its own behalf or on behalf of appellant. The fourth claim is still pending.

After the Government and the appellee had reached agreement on the claims that were settled, William T. Sherwood, Jr., counsel for the appellant, wrote to Albert H. Greene on September 18, 1959, and claimed that his client still had a right to a portion of the settlement, although he said in his letter that "the Department of Justice accepted a compromise settlement *different from that described in the letter agreement of June 4, 1959.*" (Emphasis supplied) Appellants, therefore, knew that the settlement proposed in the June 4 letter was not made. The letter of September 18, 1959 reads as follows:

"September 18, 1959

"Albert G. Greene, Esq.
1000 Connecticut Avenue, N.W.
Washington 6, D. C.

"Dear Mr. Greene:

"As you know, your client, American Pipe and Steel Company, made a letter agreement dated June 4, 1959, with my client, Western Urn Manufacturing Company, Farmer Bros. Co., for a proportionate payment of the claim filed by your client on behalf of my client against the United States in the U.S. Court of Claims, No.

272-58. The agreement provides that such payment is to be made by your client if your client is able to effect a compromise of four claims, identified in the letter agreement, by your client against the United States. The consideration for this letter agreement is the extension by my client of the time for payment by your client of a promissory note given by your client to my client, the payment by your client of interest at 6% per month and the promise by your client to pay the promissory note in full immediately upon receipt of monies from the United States pursuant to the compromise settlement described in the letter agreement of June 4, 1959.

"On September 4, 1959, the Department of Justice accepted a compromise settlement *different from* that described in the letter agreement of June 4, 1959. Under the new and different compromise settlement, the two claims, No. 414-57 and No. 520-57 in the total amount of \$538,882.00, were settled by the entry of judgment by the U.S. Court of Claims on September 8, 1959 for your client in the amount of \$300,000.00. Case No. 272-58 filed by your client on behalf of my client was dismissed by the same court order pursuant to the compromise settlement.

"The Department of Justice refused to compromise the fourth claim, Case No. 445-57, in which your client claims \$302,272.00 from the United States, according to our information.

"The percentage ratio of your proposed compromise settlement of \$500,000.00 to the total amount of the four claims identified in the letter agreement of June 4, 1959, of \$897,765.00 is approximately 55.68%. The percentage ratio of the compromise settlement approved by the Court of \$300,000.00 to the total amount of the three claims of \$589,731.00 is approximately 50.87%.

"As mentioned, the consideration for the letter agreement dated June 4, 1959, is the extension of the time for your client to pay its note of \$17,541.17 to my client, plus monthly interest at the rate of 6% due on the amount of the note, and your client's promise to

pay the note immediately upon receipt of funds of the settlement with the United States.

"As you know, Congress has appropriated money to pay the judgment approved by the U.S. Court of Claims.

"In accordance with the intent of the letter agreement dated June 4, 1959, and pursuant to instructions from my client, demand is hereby made for the payment of \$25,866.89, which represented 50.87% of \$50,849.00, the amount of the claim in Case No. 272-58, and for payment of \$17,451.17 and the interest in the amount of \$1,431.00 to September 15, 1959 due to my client pursuant to the said promissory note. The total amount hereby demanded is therefore \$43,318.06 plus interest due in the amount of \$1,431.00 or a total of \$44,749.06.

"Demand is also made that payment of such amounts occur immediately upon receipt, either by you or by your client, of funds of U.S. Treasury check paid by the United States pursuant to the compromise settlement approved by the U.S. Court of Claims on September 8, 1959, and the Congressional appropriation.

"Very truly yours,

/s/ WILLIAM T. SHERWOOD, JR.

"WTS/sbb"
(Emphasis supplied.)

Appellee's covenant not to sue in Case No. 272-58, the one in which Western Urn was interested, did not constitute a settlement of appellants claim. Appellants were still free to bring their action against appellee for the full amount of their original claim.

Appellants never had any *right* to sue the United States since it was a subcontractor and there was no privity between it and the Government. American Pipe's covenant not to sue the United States in that case had no effect at all upon appellants rights.

American Pipe had agreed to make a settlement with Western Urn *if* it was able to settle the four claims in-

volved. It was unable to settle the four claims. Because the Western Urn claim was without merit in the eyes of the Government, no payment was made for its settlement. American Pipe simply agreed not to sue the United States for that claim.* It left itself amenable to suit by Western Urn for whatever claim Western Urn wished to assert against it. It might be noted that both appellant and appellee are corporations doing business in California and that appellant has been free at all times to bring suit in California for whatever it alleges to be due from American Pipe and Steel Corporation.

On October 16, 1959, the United States issued its check for \$209,243.03 to the American Pipe and Steel Corporation. Since this payment was not made in settlement of the four claims as specified in the agreement with appellant, the appellee was under no duty to pay any portion of it to Western Urn. The check was therefore negotiated in Washington, D. C., only for the purpose of paying the law firm of Ford, Larson, Greene & Horan, the fee which was due to it for services performed over a period of several years in connection with the claims. The fee was a just debt owed by appellee to the law firm and appellee had every right under the laws of the District of Columbia to pay it. The fact that Western Urn was contemplating instituting an *in rem* suit against it in the District of Columbia was unknown both to the appellee and to its attorneys. The truth is, however, that no attachment existed

* Western Urn, by its attorneys, Hoag & Galbally of Los Angeles, California, refused to accept any of expense or responsibility for the case of American Pipe & Steel Corporation to the use of Western Urn Mfg. Co. v. U.S., Ct. CL Docket No. 272-58. In a letter to Albert H. Greene, dated March 13, 1959 the Western Urn attorneys stated:

"*My clients, Western Urn, feel that this matter should be a matter between your office and your client, American Pipe and Steel.*" (Emphasis supplied)

Appellants thus made it crystal clear that Greene was acting only for his client, American Pipe. See also the letter of November 9, 1959, from appellee's California attorney to appellant's California attorney, attached hereto as an appendix.

while the original check was in the hands of Mr. Greene. At that time the Writ of Attachment was served on him, payment of the fee had been made and no funds of appellee were in his hands or in the hands of any member of the law firm.

CONCLUSION

This Court points out at page 9, footnote 12, of its decision that the appellants "specifically disclaimed reliance upon fraud" as a basis for establishing a fraudulent conveyance. The crux of the matter is the right of American Pipe to pay its just and earned attorney fees.

This Court seems to say in its opinion that an unusual method of clearing the Government check was employed. It is difficult to understand just what is meant by this conclusion. Mr. Greene made the arrangements in accordance with the wishes of his client to obtain the proceeds of the settlement less the legal fee due to Mr. Greene's firm. The appellee was under no special obligation to use any particular bank or any particular method of obtaining its money or paying its fee. That it was done in the manner in which it was done constitutes no basis at all for a conclusion that a fraudulent conveyance was involved. The law in the District is quite clear with regard to payments in preference of certain creditors. A creditor may lawfully do this at any time he chooses and the mere fact that another creditor is to be deprived of a payment he alleges to be due to himself cannot make the transaction a fraudulent conveyance. The appellee paid its lawyers their just fee. The manner in which the payment was made cannot alter this in any way.

Therefore, appellee respectfully requests this Court to reconsider its decision in this case, especially in the light

of the rule in this jurisdiction with regard to the preference of one creditor over another.

Respectfully submitted,

PEYTON FORD
1000 Connecticut Avenue
Washington 6, D. C.
Attorney for Appellee

Of Counsel:

FORD, LARSON, GREENE & HORAN
1000 Connecticut Avenue
Washington 6, D. C.

CERTIFICATE OF COUNSEL

This PETITION FOR REHEARING is presented in good faith and not for delay.

PEYTON FORD
1000 Connecticut Avenue
Washington 6, D. C.
Attorney for Appellee

APPENDIX

LANDON MORRIS
Attorney-at-Law
Suite 429 Rowan Building
458 South Spring Street
Los Angeles 13
Michigan 8352

November 9, 1959

William Galbally, Jr., Esq.
541 S. Spring Street
Los Angeles 13, California

Dear Mr. Galbally:

Enclosed are two cashier's checks as follows:

1. Security First National Bank of Los Angeles #740299, dated October 19, 1959 in the amount of \$18,029.95. This check is tendered in payment of the balance of principal on American Pipe & Steel Corporation's note to Western Urn Co. dated December 29, 1958 and accrued interest at 6% per annum from April 1, 1959 to October 19, 1959. It includes principal of \$17,451.17 and interest of \$578.78.
2. United States National Bank of San Diego #11840 dated November 6, 1959 in the amount of \$63.11. This check is tendered in payment of interest accruing on the above mentioned note from October 19, 1959 through tomorrow, November 10, 1959.

My client has turned over to me your letter of September 22, 1959. Your letter is in error in stating that the Department of Justice accepted a compromise settlement of the three claims you mention. Settlement was made only of cases Nos. 414-57 and 520-57. The fact is that the government would not pay anything in settlement of your client's claim, being case No. 272-58. As you will undoubtedly recall, you refused to pay anything to American

Pipe's Washington attorneys for their services in connection with your client's cases, and accordingly, this case was dismissed without prejudice, and my client executed a covenant with the government not to sue on it, either on its own behalf or your client's. Mr. Jack Lane, President of American Pipe & Steel Corporation advises me that you told him your client would be willing to prosecute its case No. 272-58 on its own behalf and my client, of course, has no objection if you should determine to do this.

If, however, it is your position that the letter agreement of June 4, 1959 applies because of the settlement of the two cases, it seems to me it is premature for you to now demand payment of any part of the settlement until all four of the Court of Claims cases have been finally disposed of. American Pipe & Steel Corporation's case No. 445-57 has not yet been settled and it may be necessary for this case to be tried, although a trial date has not yet been fixed.

I would suggest that you let me know your intentions with respect to further prosecution of Case No. 272-58 and I will likewise inform you when American Pipe & Steel Corporation's remaining case has either been settled or pursued to final judgment.

Very truly yours,

LANDON MORRIS

LM:ELM

Encl.

Certified Mail

160

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

United States Court of Appeals
For the
District of Columbia Circuit

FILED

JUN 6 1962

No. 16,600

Joseph W. Stewart
CLERK

WESTERN URN MANUFACTURING COMPANY, AND
FARMERS BROS. CO.,

Appellants,

v.

AMERICAN PIPE & STEEL CORPORATION,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

**ANSWER
TO
PETITION FOR REHEARING**

United States Court of Appeals
for the District of Columbia Circuit

FILED JUN 6 1962

Joseph W. Stewart
CLERK

JOHN H. MacVEY

803 Mills Building
Washington 6, D. C.

Attorney for Appellants

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16,600

WESTERN URN MANUFACTURING COMPANY, AND
FARMERS BROS. CO.,

Appellants,

v.

AMERICAN PIPE & STEEL CORPORATION,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

**ANSWER
TO
PETITION FOR REHEARING**

Appellee's petition requesting this Court to reconsider its decision made on April 12, 1962, in this case does not state anything new. Every legal argument made by counsel for appellees in their petition for rehearing has been presented to this Court at one time or another in this case. (See, for example, page 14 of appellee's brief where counsel for appellee make the claim that the conveyance of the \$50,000

was a proper preference in payment of a proper legal fee. See also the first full paragraph on page 9 of this Court's opinion where this Court states the argument of counsel for appellee reiterated in the petition for rehearing that the \$50,000 was the property of counsel for appellee and was therefore not subject to attachment.)

The Petition for Rehearing Misconceives the Decision of This Court

Counsel for appellee again have misunderstood the decision of this Court and therefore have misconceived the basis of this Court's unanimous decision in this case.

Appellants claimed that they had the right to present facts on which appellants base their assertion that the lower court has jurisdiction to determine this action and that the "finding" by the lower court prematurely cut off appellants from exercising their statutory rights. The June 4, 1959, letter agreement (quoted in appellee's petition at page 2) on which appellants base in part their claim against appellee for money due therefore has nothing whatever to do with the issues on appeal which were properly decided by this Court.

By a unanimous decision, this Court upheld appellants' contention and decided that the action of the lower court constituted reversible error requiring remand of the action to the lower court for further proceedings and requiring the filing of the proposed amended complaint to permit appellants to prove the jurisdictional facts, if appellants are able to do so.

This Court correctly pointed out that appellants were entitled to file a traverse after oral examination and to raise an issue with respect to matters developed at the oral examination (pp. 2, 3 of the opinion).

This Court then correctly stated that appellants claim that the \$50,000 had not become the property of counsel for appellee, and correctly said that, "on that theory jurisdiction could be established by the garnishment" (p. 6 of the opinion).

The Court then examined the proposed amended complaint on which the appellants' contentions rest (pp. 7, 8 and 9 of the opinion). The Court then concluded that the proposed amended complaint showed, "Various possible bases for the assertion of rights by the appellants . . ." (p. 10 of the opinion).

The Court then held that ". . . appellants were entitled to amend their complaint to show a basis for the claimed jurisdiction . . ." This Court pointed out that, if appellants are able to prove the allegations of the proposed amended complaint, then the lower court ". . . would not lack jurisdiction. . ." (p. 11 of the opinion).

Therefore, this Court held that the "finding" by the lower court was premature and ruled that the trial judge erred in denying appellants leave to file their proposed amended complaint and erred in dismissing the action. This Court accordingly reversed the lower court's decision ". . . without adjudication of the rights of the parties . . .", and remanded the action for further proceedings. (pp. 11, 12 of the opinion).

The June 4, 1959, letter agreement relates only to the "rights of the parties" with respect to appellants' claim for money due from the appellee, which this Court in its opinion said specifically it did not adjudicate.

What counsel for appellee in effect have been and are attempting to do by indirection is to obtain dismissal of the action. It is well established that, for the purpose of deciding a motion for dismissal (as in the former procedural situation of a demurrer to a complaint), the facts alleged in the complaint are considered as admitted by the defendant appellee as true and correct. Assuming that the facts as pleaded in the proposed amended complaint are true, as this Court correctly did, then this Court properly concluded that

". . . appellants were entitled to amend their complaint to show a basis for the claimed jurisdiction . . . On such a showing, the purported conveyance . . . might be set aside,

and the funds . . . would be amenable to the writ. Accordingly . . . the court would not lack jurisdiction." (p. 11 of the opinion).

**The Interpretation of the June 4, 1959, Letter
Agreement Is Not Relevant at This Stage
of the Proceedings**

Counsel for appellee seem to have the notion that this Court should accept without question unsupported assertions made by counsel in written or oral argument and should therefore disregard the legal rights of appellants. In fact, Mr. Greene, of counsel for appellee, so stated in substance in argument to this Court. Judge Danaher correctly replied that he could not accept Mr. Greene's contention because appellants are legally entitled to have Mr. Greene take the stand as a witness and subject him to interrogation under oath.

The interpretation of the legal effect of the June 4, 1959, letter agreement, which relates to the substantive rights of the parties and not to the question of the jurisdiction of the lower court, involves evidential proof of relevant facts in addition to determination of the semantic meaning of the words of that agreement. The intent of the parties cannot be found only within the four corners of the June 4, 1959, letter agreement, but must be established by extrinsic and legally competent evidence.

Counsel for appellants most vigorously disagree with the interpretation placed upon that agreement by counsel for appellee in their petition for rehearing, which we contend contains misstatements of the true and correct facts with respect to that agreement and of the facts with respect to the compromise of the related U. S. Court of Claims cases.

The misstatements of fact contained in the argument of counsel for appellee are demonstrable in part from the face of their petition for rehearing. On page 3 of that petition, counsel for appellee state that: "there were no further negotiations to be had except an acceptance or turn-down of the offer of compromise by the Department of Justice."

On page 4 of the same petition, counsel for appellee state: "From June until early September discussions were had with the Government, of which appellants were fully apprised."

As alleged in paragraph 18 of the proposed amended complaint (Appellants' Brief, Joint Appendix, page 29), counsel for appellants claim that they were not informed at all at any time of such negotiations by counsel for appellee, as counsel for appellee had promised to do.

Since the June 4, 1959, letter agreement is not relevant to the issues properly decided by this Court in its decision of April 12, 1962, other misstatements of fact by counsel for appellee in their petition for rehearing concerning that agreement are not discussed at this time.

Conclusion

This Court, with full understanding of the arguments of counsel for appellee reiterated in their petition for rehearing, has held that appellants are entitled, after oral examination, to file a traverse and to raise an issue with respect to matters developed at the oral examination, and that appellants are entitled to amend their complaint to show a basis for the claimed jurisdiction of the lower court. Therefore, this Court reversed the decision of the lower court and remanded the action for further proceedings without adjudicating the substantive rights of the parties to the action.

The petition for rehearing does not state anything new for this Court to consider and therefore the petition for rehearing should be denied.

Respectfully submitted,

JOHN H. MacVEY

803 Mills Building
Washington, D. C.

Attorney for Appellants

160

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

*United States Court of Appeals
For the
District of Columbia Circuit*

FILED

JUN 6 1962

No. 16,600

Joseph W. Stewart

CLERK

WESTERN URN MANUFACTURING COMPANY, AND
FARMERS BROS. CO.,

Appellants,

v.

AMERICAN PIPE & STEEL CORPORATION,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ANSWER
TO
PETITION FOR REHEARING

JOHN H. MacVEY

803 Mills Building
Washington 6, D. C.

Attorney for Appellants

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16,600

WESTERN URN MANUFACTURING COMPANY, AND
FARMERS BROS. CO.,

Appellants,

v.

AMERICAN PIPE & STEEL CORPORATION,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

**ANSWER
TO
PETITION FOR REHEARING**

Appellee's petition requesting this Court to reconsider its decision made on April 12, 1962, in this case does not state anything new. Every legal argument made by counsel for appellees in their petition for rehearing has been presented to this Court at one time or another in this case. (See, for example, page 14 of appellee's brief where counsel for appellee make the claim that the conveyance of the \$50,000

was a proper preference in payment of a proper legal fee. See also the first full paragraph on page 9 of this Court's opinion where this Court states the argument of counsel for appellee reiterated in the petition for rehearing that the \$50,000 was the property of counsel for appellee and was therefore not subject to attachment.)

The Petition for Rehearing Misconceives the Decision of This Court

Counsel for appellee again have misunderstood the decision of this Court and therefore have misconceived the basis of this Court's unanimous decision in this case.

Appellants claimed that they had the right to present facts on which appellants base their assertion that the lower court has jurisdiction to determine this action and that the "finding" by the lower court prematurely cut off appellants from exercising their statutory rights. The June 4, 1959, letter agreement (quoted in appellee's petition at page 2) on which appellants base in part their claim against appellee for money due therefore has nothing whatever to do with the issues on appeal which were properly decided by this Court.

By a unanimous decision, this Court upheld appellants' contention and decided that the action of the lower court constituted reversible error requiring remand of the action to the lower court for further proceedings and requiring the filing of the proposed amended complaint to permit appellants to prove the jurisdictional facts, if appellants are able to do so.

This Court correctly pointed out that appellants were entitled to file a traverse after oral examination and to raise an issue with respect to matters developed at the oral examination (pp. 2, 3 of the opinion).

This Court then correctly stated that appellants claim that the \$50,000 had not become the property of counsel for appellee, and correctly said that, "on that theory jurisdiction could be established by the garnishment" (p. 6 of the opinion).

The Court then examined the proposed amended complaint on which the appellants' contentions rest (pp. 7, 8 and 9 of the opinion). The Court then concluded that the proposed amended complaint showed, "Various possible bases for the assertion of rights by the appellants . . ." (p. 10 of the opinion).

The Court then held that ". . . appellants were entitled to amend their complaint to show a basis for the claimed jurisdiction . . ." This Court pointed out that, if appellants are able to prove the allegations of the proposed amended complaint, then the lower court ". . . would not lack jurisdiction. . ." (p. 11 of the opinion).

Therefore, this Court held that the "finding" by the lower court was premature and ruled that the trial judge erred in denying appellants leave to file their proposed amended complaint and erred in dismissing the action. This Court accordingly reversed the lower court's decision ". . . without adjudication of the rights of the parties . . .", and remanded the action for further proceedings. (pp. 11, 12 of the opinion).

The June 4, 1959, letter agreement relates only to the "rights of the parties" with respect to appellants' claim for money due from the appellee, which this Court in its opinion said specifically it did not adjudicate.

What counsel for appellee in effect have been and are attempting to do by indirection is to obtain dismissal of the action. It is well established that, for the purpose of deciding a motion for dismissal (as in the former procedural situation of a demurrer to a complaint), the facts alleged in the complaint are considered as admitted by the defendant appellee as true and correct. Assuming that the facts as pleaded in the proposed amended complaint are true, as this Court correctly did, then this Court properly concluded that

" . . . appellants were entitled to amend their complaint to show a basis for the claimed jurisdiction . . . On such a showing, the purported conveyance . . . might be set aside,

and the funds . . . would be amenable to the writ. Accordingly . . . the court would not lack jurisdiction." (p. 11 of the opinion).

**The Interpretation of the June 4, 1959, Letter
Agreement Is Not Relevant at This Stage
of the Proceedings**

Counsel for appellee seem to have the notion that this Court should accept without question unsupported assertions made by counsel in written or oral argument and should therefore disregard the legal rights of appellants. In fact, Mr. Greene, of counsel for appellee, so stated in substance in argument to this Court. Judge Danaher correctly replied that he could not accept Mr. Greene's contention because appellants are legally entitled to have Mr. Greene take the stand as a witness and subject him to interrogation under oath.

The interpretation of the legal effect of the June 4, 1959, letter agreement, which relates to the substantive rights of the parties and not to the question of the jurisdiction of the lower court, involves evidential proof of relevant facts in addition to determination of the semantic meaning of the words of that agreement. The intent of the parties cannot be found only within the four corners of the June 4, 1959, letter agreement, but must be established by extrinsic and legally competent evidence.

Counsel for appellants most vigorously disagree with the interpretation placed upon that agreement by counsel for appellee in their petition for rehearing, which we contend contains misstatements of the true and correct facts with respect to that agreement and of the facts with respect to the compromise of the related U. S. Court of Claims cases.

The misstatements of fact contained in the argument of counsel for appellee are demonstrable in part from the face of their petition for rehearing. On page 3 of that petition, counsel for appellee state that: "there were no further negotiations to be had except an acceptance or turn-down of the offer of compromise by the Department of Justice."

On page 4 of the same petition, counsel for appellee state: "From June until early September discussions were had with the Government, of which appellants were fully apprised."

As alleged in paragraph 18 of the proposed amended complaint (Appellants' Brief, Joint Appendix, page 29), counsel for appellants claim that they were not informed at all at any time of such negotiations by counsel for appellee, as counsel for appellee had promised to do.

Since the June 4, 1959, letter agreement is not relevant to the issues properly decided by this Court in its decision of April 12, 1962, other misstatements of fact by counsel for appellee in their petition for rehearing concerning that agreement are not discussed at this time.

Conclusion

This Court, with full understanding of the arguments of counsel for appellee reiterated in their petition for rehearing, has held that appellants are entitled, after oral examination, to file a traverse and to raise an issue with respect to matters developed at the oral examination, and that appellants are entitled to amend their complaint to show a basis for the claimed jurisdiction of the lower court. Therefore, this Court reversed the decision of the lower court and remanded the action for further proceedings without adjudicating the substantive rights of the parties to the action.

The petition for rehearing does not state anything new for this Court to consider and therefore the petition for rehearing should be denied.

Respectfully submitted,

JOHN H. MacVEY

803 Mills Building
Washington, D. C.

Attorney for Appellants

REPLY BRIEF FOR APPELLANTS

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16,600

FILED

United States Court of Appeals
For the District of Columbia Circuit
28 1961
Joseph W. Stewart
CLERK

WESTERN URN MANUFACTURING COMPANY, AND
FARMERS BROS. CO.,

Appellants,

v.

AMERICAN PIPE & STEEL CORPORATION,

Appellee.

Appeal from the United States District Court
for the District of Columbia

JOHN H. MacVEY

1025 Connecticut Avenue, N.W.
Washington 6, D. C.

Attorney for Appellants

INDEX

	<u>Page</u>
STATUTES INVOLVED	1
SUMMARY OF ARGUMENT	3
ARGUMENT	
I. The appellants' statutory right to oral examination of both garnishees, traverse of the answers of the garnishees, and trial by jury of the issues framed by such traverse of issues concerning the validity of the levy of attachment on assets of the defendant appellee by service of the writ of attachment before judgment on the garnishee Greene, counsel for the appellee, was improperly cut off by the premature "finding" of the court below, requiring reversal by this Court of the action by the lower court	4
II. The proposed amended complaint does not change the cause of action originally alleged against the defendant appellee and was properly made to allege additional facts to show that this action comes within the jurisdiction which this Court has held in this case is possessed by the lower court	10
III. Counsel for appellants has not at any time or in any way admitted that the conveyance of the \$50,000 to the garnishee Greene and his associates was proper	12
IV. Joinder of a claim to set aside a fraudulent conveyance with a claim for money due under a contract is procedurally correct in this case	15
CONCLUSION	15

CASES CITED

Britton v. Dowell, 243 F.2d 435 (C.C.A. 10, 1957)	6
Fidelity Savings Co. v. Security Savings & Commercial Bank, 3 F.2d 35, 55 App. D.C. 180 (1925)	8
Ourisman Chevrolet, Inc. v. Pohanka Service, Inc., 138 A.2d 668 (Mun. Ct. App. D.C., 1958)	8
Pinkston v. Briley, 118 A.2d 185 (Mun. Ct. App. D.C., 1957)	8
Smith v. Anderson, 107 A.2d 126 (Mun. Ct. App. D.C., 1954)	14
Troshinsky v. Feldman, 81 A.2d 91 (Mun. Ct. App. D.C., 1951)	7, 9, 10
Young v. Nicholson, 107 F.2d 177, 70 App. D.C. 351 (1939)	7, 9

UNITED STATES COURT OF APPEALS
For The District Of Columbia Circuit

No. 16,600

WESTERN URN MANUFACTURING COMPANY, AND
FARMERS BROS. CO.,

Appellants,

v.

AMERICAN PIPE & STEEL CORPORATION,

Appellee.

Appeal from the United States District Court
for the District of Columbia

REPLY BRIEF FOR APPELLANTS

STATUTES INVOLVED

Sec. 12-401 (D. C. Code, 1961 ed.)

"Every conveyance or assignment, in writing or otherwise, of any estate or interest . . . in goods or things in action, and every charge upon the same . . . with the intent to hinder, delay, or defraud creditors or other persons having just claims or demands of their lawful suits, damages, or demands, shall be void as against the persons so hindered, delayed, or defrauded; Provided, That nothing herein shall

be construed to affect or impair the title of a purchaser for a valuable consideration, unless it shall appear that such purchaser had previous notice of the fraudulent intent of his immediate grantor, or of the fraud rendering void the title of such grantor; Provided further, That the question of fraudulent intent shall be deemed a question of fact and not of law."

Sec. 16-316 (D. C. Code, 1961 ed.)

"Any defendant, any garnishee, any party to a forthcoming undertaking, or the officer who might be adjudged liable to the plaintiff by reason of such undertaking being adjudged insufficient, or any stranger to the suit who may make claim, as hereinafter provided, to the property attached, may plead to the attachment; and such pleas shall be considered as raising an issue without replication, and any issue of fact thereby made may be tried by the court or by a jury impaneled for the purpose, if either party desires to."

Sec. 16-317 (D. C. Code, 1961 ed.)

"If any garnishee shall answer to interrogatories that he has no property or credits of the defendant, or less than the amount of the plaintiff's claim, the plaintiff may traverse such answer as to the existence or amount of such property or credits, and the issue thereby made may be tried as provided in section 16-316, . . . And if such issue be found for the plaintiff, judgment shall be rendered as if possession of the property or credits had been confessed by the garnishee."

Sec. 16-326 (D. C. Code, 1961 ed.)

"If the ground upon which an attachment is applied for be that the defendant has assigned, conveyed, or disposed of his property with intent to hinder, delay, or defraud his creditors, the attachment may be levied upon the property alleged to be so assigned or conveyed in the hands of the alleged fraudulent assignee or transferee, as a garnishee."

Sec. 16-328 (D. C. Code, 1961 ed.)

"If the said levy shall not be so set aside, the said garnishee may plead that he was a bona fide purchaser from the defendant for value without notice of any fraud on the part of said defendant, and such plea shall be held to make

an issue, without any further pleading in reply thereto; and said issue may be tried as directed in section 16-316."

Sec. 16-331 (D. C. Code, 1961 ed.)

"All issues raised by pleas to the attachment, in any case, may be tried at the same time as the issues raised by the pleadings in the action, or separately, as the convenience of the court may require."

SUMMARY OF ARGUMENT

The appellate court has held in this case that the lower court does have jurisdiction of this action if it is shown that the levy of attachment by service of the writ of attachment before judgment upon the garnishee Greene, counsel for the defendant, was valid, thereby making the service of process upon the defendant valid in accordance with applicable statutes.

The question of whether the levy by service of the writ of attachment upon the garnishee Greene was valid process upon the defendant is a mixed question of fact and law. The additional allegations by which plaintiffs sought to bring relevant facts before the court only concern the preliminary jurisdictional question of the validity of the service of process by writ of attachment before judgment and do not in any way modify or change the main cause of action against the defendant. Accordingly, they do not constitute any change in the cause of action against the defendant and are properly designed to show that the lower court does have jurisdiction of this particular action since the service of process upon defendant is valid because the service of the writ of attachment upon the garnishee Greene is valid.

Appellants assert a lien upon the proceeds of the U.S. Treasury check involved in this action resulting from the agreement of June 4, 1959, between the appellants and the defendant appellee which lien is prior to any claim upon the said proceeds by the garnishee Greene by operation of statute (Sec. 16-308 of the D. C. Code, 1961 ed.), particularly since the garnishee Greene admitted in open court before Judge McGuire

that he and his associates did not have any lien upon the proceeds of said check for counsel fees. (See also, Record, Reply to Plaintiffs' Motion for Leave to File Amended Complaint, etc.)

Appellants sought to show to the court below that the garnishee had an agreement with counsel for appellants concerning payment of appellants' claim from the proceeds of said U. S. Treasury check; that the garnishee Greene therefore knew that appellants expected to have their claim paid from the proceeds of said check; that despite this knowledge the garnishee arranged for payment of his claim for counsel fees without payment of appellants' claim, all of which constituted a fraudulent conveyance with the intent to hinder and delay the creditors, namely, the appellants, all as more particularly set forth in the proposed amended complaint (J.A. 24-35). If such allegations are proved by competent evidence, then assets of the defendant appellee were in the possession of the garnishee Greene at the time when he was served with the writ of attachment before judgment and, in that event, the service of process upon the defendant appellee is valid because the service of the writ of attachment upon the garnishee Greene is valid, thereby giving the lower court jurisdiction of this action in accordance with the prior decision of the appellate court in this action.

Counsel fees are not sacrosanct. The garnishee Greene cannot correctly claim that he was a bona fide purchaser for value without notice of appellants' claim and the question of whether the conveyance of \$50,000.00 from the proceeds of the said U. S. Treasury check was a fraudulent conveyance directly involves the question of fraudulent intent, which by statute (Sec. 12-401) is a question of fact and not of law.

In the circumstances of this case, the question of fraudulent intent is a "jurisdictional fact" which appellants are entitled to have put in issue and determined in accordance with the statutory procedure specified by the above-quoted sections of Title 16 of the D. C. Code. Appellants sought to bring before the lower court the pertinent facts concerning

the jurisdictional question first by following the statutory procedure specified in Title 16 and by supplementing that procedure by a proposed amended complaint to allege the pertinent facts, which appellants submit they were entitled to do under the provisions of Sec. 16-331 of the D. C. Code (1961 ed.).

The premature "finding" and the resulting dismissal of this action by the lower court improperly cut off appellants' right to follow the applicable statutory procedure before the oral examination of both garnishees was completed and before the issues on the jurisdictional question were framed. This denial of the statutory rights of appellants constitutes reversible error so that the action of the lower court must be vacated and this action remanded for further proceedings.

ARGUMENT

Appellants respectfully submit that appellee has again misconceived the character and nature of this action and have drawn incorrect inferences and made distorted interpretations of appellants' brief to which appellants must make reply by this brief.

I

The Appellants' Statutory Right to Oral Examination of Both Garnishees, Traverse of the Answers of the Garnishees, and Trial by Jury of the Issues Framed by Such Traverse of Issues Concerning the Validity of the Levy of Attachment on Assets of the Defendant Appellee by Service of the Writ of Attachment Before Judgment on the Garnishee Greene, Counsel for the Appellee, Was Improperly Cut Off by the Premature "Finding" and Resulting Dismissal of This Action by the Court Below, Requiring Reversal by This Court of the Action of the Lower Court.

Understanding of appellants' argument will be aided by an understanding of the "posture of the case" at the time when this court remanded this action to the lower court.

By its decision of October 6, 1960, in this action, this Court decided that the lower court does have jurisdiction to hear and determine this action against the non-resident corporate appellee if the lower court should conclude that the levy of attachment on assets of the defendant appellee by service in the District of Columbia of the writ of attachment upon the garnishee Greene is valid, thereby making valid the process upon the defendant appellee by attachment of its assets in the District of Columbia. The specific question concerning the validity of the levy of attachment by service of the writ on the garnishee Greene depends on whether the garnishee Greene was "possessed" of assets of the defendant appellee at the time when he was served in the District with the writ of attachment before judgment in this action.

This Court therefore remanded this action to the lower court with instructions to determine the jurisdictional question of the attachment affecting the validity of process and, if the lower court decided that the process was valid, the lower court was instructed to proceed to hear and determine this action. As counsel for appellants has previously emphasized, the question of "possession" within the meaning of the applicable quoted statutes is a mixed question of fact and law (App't's Brief 18). Accordingly, it is respectfully submitted that this Court used the word "finding" in its mandate contained in its opinion of October 6, 1960, in the general sense of "decision" or "determination" as used in the Britton case (App't's Brief 16), and not in the technical limited meaning of "finding of fact" as used in administrative law of administrative agencies.

However, this Court did not indicate or instruct in any way what procedure was to be followed to enable the lower court to adjudicate the jurisdictional question of the validity of the process by the levy of attachment by service of the writ upon the garnishee Greene.

At that stage of the action, therefore, counsel for appellants had to take the initiative in deciding how to proceed with the case.

At this point, it is emphasized that appellants claim a lien on the proceeds of the U. S. Treasury check which is involved in this action. By operation of the written agreement dated June 4, 1959, between the appellants and the appellee (J.A. 3, 31), appellants have a claim against a certain portion of the proceeds of the U. S. Treasury check involved in this action. By operation of Sec. 16-308 of the D. C. Code (1961 ed.), appellants claim that the filing of the attachment with the marshal's office on October 16, 1959, at 12:56 P.M. (Tr. 25) established a lien which is prior to any claim by the garnishee Greene and his associates against the proceeds of the same U. S. Treasury check for \$50,000 as counsel fees. This is particularly true because the garnishee Greene admitted in open court before Judge McGuire in the unreported colloquy (Tr. 27) that he and his associates did not have any lien for payment of counsel fees from the proceeds of the U. S. Treasury check issued in payment of the U. S. Court of Claims judgment because of the prohibitions of Federal law (see also, Record, Reply etc., cited above). Appellants respectfully submit that they are entitled to have the priority of their asserted lien adjudicated by the procedures specified in Title 16 of the D. C. Code (Troshinsky v. Feldman, 81 A. 2d 91 (Mun. Ct. App. D. C., 1951)).

The procedure under Title 16 by which the validity of an asserted prior lien is established is well described in Young v. Nicholson, 107 F. 2d 177, 70 App. D.C. 351 (1939), it being emphasized that the D. C. Code provisions discussed in that case are identical to the present provisions of the D. C. Code. In that case, this Court stated that the statutory procedure is as follows:

- (a) written interrogatories directed to the garnishee;
- (b) oral examination by plaintiff of the garnishee;
- (c) traverse after oral examination by plaintiff of the answers made by the garnishee; and
- (d) determination by the court or by a jury, if requested by plaintiff, of the issues joined by the traverse.

(To same effect, Pinkston v. Briley, 118 A.2d 185 (Mun. Ct. App. D.C., 1957); Ourisman Chevrolet, Inc. v. Pohanka Service, Inc., 138 A.2d 668 (Mun. Ct. App. D.C., 1958)). As held in the Troshinsky case, this procedure is a matter of statutory right of which the plaintiff cannot be properly deprived.

The procedure described in the Nicholson case is the procedure which the appellants sought to follow and of which they were improperly deprived by the premature "finding" and the resulting dismissal of this action by the court below.

It is clear from the cited court decisions that the step of oral examination is in the nature of a discovery proceeding to obtain necessary information and that, accordingly, the plaintiff does not have to traverse the answers of the garnishee until after oral examination, so that the framing of the issues for determination by the court are subsequent to the oral examination of the garnishee by the plaintiff. In Fidelity Savings Co. v. Security Savings & Commercial Bank, 3 F.2d 35, 55 App. D.C. 180 (1925), this Court stated:

"... in case the garnishee denies the possession of any property or credits of the defendant, the plaintiff may traverse the answer, and the issue thus made may then be adjudicated. This provision, however, is not inconsistent with the provision in section 447 (now sec. 16-303 of the D. C. Code, 1961 ed.) permitting an oral examination of the garnishee. Such an examination may be necessary for the information of the creditor before he is able to decide whether to traverse the answer of the garnishee."

It is emphasized that in this action the garnishee Greene has not made any answer to the written interrogatories served upon him (J.A. 10). He has, however, attempted to deny "possession" of any assets of the defendant appellee and to claim the defense of being a bona fide purchaser for value without notice of any fraudulent intent on the part of the defendant appellee by self-serving statements in written and oral argument in the court below (see, for example, Record, Reply to Plaintiffs' Motion

for Leave to File Amended Complaint and to Strike Proposed Amended Complaint, etc.). Appellants concede that the garnishee Greene has the legal right to assert these defenses, but appellants contend that such defenses involve questions of fact, such as fraudulent intent which must be adjudicated in accordance with the statutory procedure as described in the Nicholson case, supra.

Counsel for appellants therefore decided to proceed to obtain adjudication of the jurisdictional question of the validity of the levy of the attachment by service of the writ on the garnishee Greene by using the statutory procedure summarized in the Nicholson case, supra. Counsel for appellants decided to examine orally the garnishees separately and therefore first obtained an order to examine orally only one of the garnishees, the National Savings & Trust Co. (J.A. 20, 21).

Under Sec. 16-331 of the D. C. Code (1961 ed.), all issues raised by pleas to the attachment (namely, the defenses attempted to be asserted by the garnishee Greene in argument in the court below) may be tried at the same time as the issues raised by the pleadings in the action or separately. In an effort to avoid the fate of counsel for the plaintiff in the Troshinsky case, who was cut off by the trial court before he had presented his case, counsel for appellants sought to bring the pertinent facts concerning jurisdiction before the lower court by filing an amended complaint. In doing so, counsel for appellants did not waive his right to the statutory procedure for adjudication of the validity of the levy of the attachment by service of the writ on the garnishee Greene. On the contrary, he was using his statutory right of presenting alternative procedures under Sec 16-331. It is therefore emphasized that it is doubtful whether it was necessary for counsel for appellants to file an amended complaint in order to obtain adjudication of the issues concerning the validity of the process upon the defendant appellee by levy of the attachment by service of the writ upon the garnishee Greene. However, appellants respectfully reassert that the proposed amended complaint should be allowed to be filed, as urged in appellants' principal brief.

On the basis of the above cited cases, it is obviously wrong for appellee to claim that counsel for appellants should have "traversed" the "finding" by the lower court and that failure to do so constitutes an admission by counsel for appellants (App'e's Brief 13, 14). The only way for counsel for appellants to challenge the "finding" by the court which was specifically limited and not final (J.A. 36) was by a motion for reconsideration, which was made (J.A. 38) and by an appeal, which was taken (J.A. 38).

At the oral examination of the National Savings & Trust Co. held on April 17, 1961, Judge McGuire made his "finding" (J.A. 35, 36), to which counsel for appellants objected as "premature" (Tr. 27). That "finding" and the resulting order dismissing the action (J.A. 36, 37) improperly cut off appellants from continuing with the statutory procedure specified for determination of the validity of the levy of the attachment by service of the writ upon the garnishee Greene, and therefore constitutes reversible error, as held in the Troshinsky case, supra.

II

The Proposed Amended Complaint Does Not Change the Cause of Action Originally Alleged Against the Defendant Appellee and Was Properly Made to Allege Additional Facts to Show That This Action Comes Within the Jurisdiction Which This Court Has Held in This Case Is Possessed by the Lower Court.

In any action, two kinds of jurisdictional question arise: first, whether the lower court has the jurisdiction to hear and determine cases of a particular type or class; and second, whether the particular case is one within the type or class of cases which the lower court has the jurisdiction to hear and determine.

In the action, this Court by its decision of October 6, 1960, has determined the first question and held that the court below does have jurisdiction to hear cases of the type in which this action falls, namely, an action by a non-resident corporation against another non-resident

corporation based upon service upon a garnishee within the District of Columbia of a writ of attachment before judgment having assets of the defendant in his possession in the District of Columbia.

This Court then remanded this action for determination of the second question because of the factual gaps in the record concerning the validity of the levy of attachment on assets of the appellee by service of the writ on the garnishee Greene in the District of Columbia. Such question does not in any way involve the question of the validity of the cause of action by appellants against the appellee.

All of the proposed additional allegations in the proposed amended complaint, which appellants intended to prove by the statutory procedure of Title 16, relate only to the question of the validity of process by levy of an attachment by writ served on the garnishee Greene, and do not in any way change or modify the basis of the claim by appellants against the appellee for money due under a contract concerning the proceeds of the U. S. Treasury check, as a reading of the proposed amended complaint will show (J.A. 24-35). Appellants therefore have not changed their theory of the action against the defendant appellee. They, on the contrary, have asserted a different theory concerning the validity of the levy of attachment by service of the writ upon the garnishee Greene based upon later discovered evidence which counsel for appellants could not have known before filing the original complaint. Such additional allegations therefore do not modify or change the general jurisdiction of the lower court within which this Court has held this case comes.

The specific allegations concerning the validity of the levy of attachment by service of the writ on the garnishee Greene depend in large part upon the details of the negotiation of the U. S. Treasury check received by Greene. The original complaint necessarily had to be drafted and filed before the check was negotiated. It is therefore ridiculous for appellee to suggest (Record, Reply to Plaintiffs' Motion, etc., par. 10) that counsel for appellants knew the details of the

negotiation of the U. S. Treasury check before the check was negotiated. It is respectfully submitted that appellants have the right to amend the original complaint to supply additional jurisdictional facts which do not change the main cause of action and which could not have been known when the original complaint was drafted and filed. Accordingly, the attempt by appellee in Part I of its brief to distinguish the cases cited by appellants is neither apt nor pertinent.

III

**Counsel for Appellants Has Not at Any Time or in Any Way
Admitted That the Conveyance of the \$50,000 to the
Garnishee Greene and His Associates Was Proper.**

Counsel for appellee has attempted by distorted misinterpretations of language in the brief for appellants to claim that counsel for appellants has admitted that the conveyance by the defendant appellee to the garnishee Greene and his associates of \$50,000 of the proceeds of the U. S. Treasury check was proper (App'e's Brief 10, 13, 14). None of statements made by counsel for appellants at any time can properly be so construed, and counsel for appellants categorically denies that he has made any such admissions. On the contrary, counsel for appellants hereby reasserts the allegations of the proposed amended complaint that such conveyance was an illegal conveyance (J.A. 27-30).

As pointed out above, counsel for appellee misconceives the nature of a "traverse", which is a challenge of the answers of a garnishee, and not a challenge of a court order. Further, the "finding" by the court below was in effect a limited and conditional order depending for its final legal effect upon the subsequent ruling on appellant's motion for leave to file an amended complaint (J.A. 35, 36), which was challenged by counsel for appellant promptly after the final action by the court below was made (J.A. 38). The position of counsel for appellants, as stated at the oral examination of only one garnishee on April 17, 1961, was that such "finding" was premature (Tr. 27) and should not have been

made at all, as argued by appellants in the briefs filed with this Court. No admission by counsel for appellants can be squeezed out of such circumstances.

Counsel for appellee asserts that counsel for appellants has admitted that the conveyance of \$50,000 was a proper legal fee, citing tr. 10 and appellants' brief 12 (App'e's Brief 13). The statement by counsel for appellants on page 10 of the transcript was in response to a question by Judge McGuire as to what the corporate resolution by the defendant appellee which is Exhibit 2 purports to show, namely, that the corporate resolution of the defendant appellee authorized the payment of \$50,000 of the proceeds of the U. S. Treasury check to the garnishee Greene and his associates as a fee to legal counsel. Such a statement does not in any way amount to an admission that the conveyance was proper. On the contrary, the corporate resolution shows that the defendant appellee, knowing of appellants' claim against the proceeds of the U. S. Treasury check, authorized payment of a portion of such proceeds to the garnishee Green and his associates, who also knew of appellants' claim, without making any arrangements to pay appellants' claim from the same proceeds as demanded by appellants, all as alleged in the proposed amended complaint (J.A. 24-35).

As stated on pages 12 and 13 of appellants' brief, which gives a plain, unadorned statement of what happened to \$50,000 of the proceeds of the U. S. Treasury check, counsel for appellants asserted and reasserts that such conveyance was an illegal conveyance intended to hinder and delay creditors, as alleged in the proposed amended complaint (J.A. 29, 30). It clearly is not an admission of any kind.

Counsel for appellee seems to believe that a legal fee is somehow sacrosanct. Such an assumption is not correct in this case. He conveniently ignores the fact, as alleged by counsel for appellants, that counsel for appellee had made an agreement with counsel for appellants (J.A. 37), which counsel for appellee violated (J.A. 29); that he therefore

knew that counsel for appellants expected that appellants' claim would be paid from the proceeds of the U. S. Treasury check; that he participated in action by which the appellants' claim was not paid from the proceeds of the U. S. Treasury check (J.A. 29), which action necessarily hindered and delayed payment of appellants' claim (J.A. 29, 30) (which has not yet been paid), and that such action therefore was an illegal conveyance under Section 12-401 of the D. C. Code (1961 ed.). Counsel for appellee cannot fabricate any admission by counsel for appellants from distorted misinterpretations of statements by counsel for appellants.

Despite the actual knowledge by the garnishee Greene, counsel for appellee, of the oral agreement with counsel for appellants, as alleged (J.A. 27), counsel for appellee has argued orally and in writing to the court below that he and his associates were bona fide purchasers for value without notice of any fraudulent intent by the defendant appellee, and that he therefore was not "possessed" of any assets of appellee when the attachment was levied by service of the writ on the garnishee Greene (Record, Reply to Plaintiffs' Motion for Oral Examination, etc., par. 10).

As Sec. 12-401 of the D. C. Code (1961 ed.) makes clear, the question of fraudulent intent and therefore the question of "possession" are questions of fact which are to be adjudicated by competent evidence introduced at a trial in accordance with the statutory procedure specified by Title 16 of the C. D. Code and not on the basis of fabricated "admissions" or on self-serving statements in argument by counsel for the appellee.

Appellants have been improperly deprived of that procedure, as argued previously, and therefore the action of the lower court should be reversed. (To similar effect, Smith v. Anderson, 107 A.2d 126 (Mun. Ct. App. D.C., 1954.)

IV

**Joinder of a Claim to Set Aside a Fraudulent Conveyance
With a Claim for Money Due Under a Contract Is
Procedurally Correct in This Case.**

Counsel for appellee in his argument on page 15 of his brief again misconceives the character of this action and the previous decision of this Court in this action.

This Court has held in this case that the appellee is subject to the jurisdiction of the lower court if the process upon the defendant appellee is held valid because of the levy of the attachment by service of the writ of attachment on the garnishee Greene is valid. The purpose of the claim to set aside the fraudulent conveyance is to establish that assets of the defendant appellee were in the possession of the garnishee Greene in the District of Columbia when he was served with the writ of attachment. The garnishee Greene is already in effect a party to this action by operation of the garnishment statutes, and he and his associates can all be personally served in the District of Columbia.

The claim to set aside a fraudulent conveyance is therefore made properly in the District of Columbia to establish the jurisdiction of the lower court and is therefore ancillary to the main action against the defendant appellee on whom the service of process will be valid, thus making the defendant appellee a party pursuant to applicable statutory provisions governing service of process, if the fraudulent conveyance is set aside. Therefore the two claims are properly joined in the proposed amended complaint.

CONCLUSION

Despite the assertion of counsel for appellee (App'e's Brief 15), no trial of any kind has yet been held in this case. Appellants on the contrary have been deprived improperly of their right to have a trial in accordance with applicable statutes of the issues determining the validity

of the levy of attachment by service of the writ of attachment upon the garnishee Greene. If the levy of attachment is held valid in the circumstances of this case on the basis of competent evidence at a proper trial of such jurisdictional issue, then the lower court clearly will have jurisdiction to hear and determine the main action against appellee. Accordingly, the action of the court below should be reversed.

Respectfully submitted,

JOHN H. MacVEY

1025 Connecticut Avenue, N. W.
Washington 6, D. C.

Attorney for Appellants

